(18)

No. 96-1482-CFX
Status: GRANTED

Title: Lexecon, Inc., et al., Petitioners
v.
Milberg Weiss Bershad Hynes & Lerach, et al.

Docketed:
March 18, 1997

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Kellogg,Michael K.

Counsel for respondent: Maltz,Gerald, Solovy,Jerold S.

Entry	Date	Note	Proceedings and Orders
1	Mar 18 1997	G	Petition for writ of certiorari filed. (Response due April 17, 1997)
2	Apr 10 1997		Brief amicus curiae of Charles Alan Wright filed.
3	Apr 17 1997		Brief of respondents Milberg Weiss Bershad Hynes & Lerach, et al. in opposition filed.
4	Apr 17 1997		Brief of respondents Joseph W. Cotchett, et al. in opposition filed.
5	Apr 25 1997		Reply brief of petitioners Lexecon Inc., et al. filed.
6	Apr 29 1997		DISTRIBUTED. May 15, 1997 (Page 2)
7	May 19 1997		Petition GRANTED. limited to Question 1 presented by the petition. SET FOR ARGUMENT November 10, 1997. **********
9	Jun 13 1997	D	Motion of the Cotchett Respondents to be dismissed as parties to this case filed.
10	Jun 16 1997		DISTRIBUTED. June 19, 1997 (Page 15)
11	Jun 16 1997		Opposition of petitioners to motion of the Cotchett Respondents filed.
12	Jun 23 1997		Motion of the Cotchett Respondents to be dismissed as parties to this case DENIED.
13	Jul 3 1997		Joint appendix filed.
14	Jul 3 1997		Brief of petitioners Lexecon Inc., et al. filed.
15	Jul 3 1997		LODGING consisting of one copy of Class Plaintiffs' Memorandum in opposition to the motion by the Non-Leung Individual Defendants, et al., in in re MTC Electronic Technologies Shareholder Litigation, No. CV-94-1763(JG)(E.D.N.Y. May 2, 1997).
16	Jul 3 1997		Brief amicus curiae of Washington Legal Foundation filed.
17	Jul 3 1997		Brief amicus curiae of Regents of the University of California filed.
19	Jul 16 1997		Order extending time to file brief of respondent on the merits until August 18, 1997.
20	Aug 18 1997		Brief of respondents Joseph W. Cotchett, et al. filed.
21	Aug 18 1997		Brief of respondents Milberg Weiss Bershad Hynes & Lerach, et al. filed.
22	Aug 18 1997		Brief amicus curiae of Owens-Illinois, Inc. filed.
23	Aug 18 1997		Brief amici curiae of American Council of Life Insurance, et al. filed.
24	Aug 18 1997		Brief amicus curiae of Eli Lilly and Company filed.
25	Aug 18 1997		Brief amici curiae of Credit Suisse First Boston Corporation, et al. filed.
26	Aug 18 1997		Brief amicus curiae of Aerospace Industries Association of

2 pp

No. 96-1482-CFX

Entry	Date	Note	Proceedings and Orders
			America, Inc. filed.
27	Aug 25 1997	D	Motion of respondent Joseph W. Cotchett, et al. for divided argument filed.
28	Sep 16 1997		CIRCULATED.
29	Sep 17 1997	X	Reply brief of petitioners Lexecon Inc., et al. filed.
32	Sep 24 1997		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Ninth Circuit.
31	Sep 29 1997		Motion of respondent Joseph W. Cotchett, et al. for divided argument DENIED.
33	Oct 23 1997		Record filed.
		*	U.S.C.A. - Ninth Circuit BRIEFS SUBMITTED UNDER SEAL.
34	Nov 10 1997		ARGUED.

Supreme Court.
FILED
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

LEXECON INC., *et al.*,
Petitioners,
v.
MILBERG WEISS BERSHAD HYNES & LERACH, A PARTNERSHIP, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Whether a district court, to which a case has been transferred solely for "consolidated pretrial proceedings" under the federal multidistrict litigation statute, 28 U.S.C. § 1407(a), may transfer the case to itself for purposes of trial, notwithstanding section 1407(a)'s explicit command that every such case "shall be remanded" at the conclusion of pretrial proceedings "to the district from which it was transferred."

2. Whether, in ruling on a motion to dismiss, a district court may go outside the four corners of the complaint and rely on its own analysis of public record materials to decide disputed questions of fact.

PARTIES TO THE PROCEEDING BELOW

The following persons or entities were parties to the proceeding in the court of appeals:

Lexecon Inc.
Daniel R. Fischel
Milberg Weiss Bershad Hynes & Lerach
Cotchett, Illston & Pitre
Patrick Coughlin
William S. Lerach
Kevin P. Roddy
Leonard B. Simon
Melvyn I. Weiss
Patricia Hynes
Michael C. Spencer
Stephen R. Steinberg
Joseph Cotchett
Susan Illston

PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES

Lexecon Inc. is a privately held corporation that has no parent companies or subsidiaries that have issued shares to the public.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. ———

LEXECON INC., *et al.*,
Petitioners,

v.

MILBERG WEISS BERSHAD HYNES & LERACH, A PARTNERSHIP, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Lexecon Inc. and Daniel R. Fischel petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-52a) is reported at 102 F.3d 1524. The district court's opinion granting summary judgment in part (Pet. App. 64a-79a) is reported at 884 F. Supp. 1388; the court's opinion granting defendants' motion to dismiss in part (Pet. App. 80a-99a) is reported at 845 F. Supp. 1377.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 1996. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The federal multidistrict litigation statute states in pertinent part:

> When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however,* That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

28 U.S.C. § 1407(a).

The federal transfer statute provides in relevant part:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

28 U.S.C. § 1404(a).

STATEMENT OF THE CASE

Citing policy concerns, the Ninth Circuit has endorsed a widespread district court practice that is directly contrary to the relevant statutes and that undermines plaintiffs' historical right to their choice of forum for litigation.

In enacting the multidistrict litigation statute, 28 U.S.C. § 1407, Congress authorized the Judicial Panel on Multidistrict Litigation ("JPML") to transfer cases only for

purposes of "coordinated or consolidated pretrial proceedings." 28 U.S.C. § 1407(a). Congress specified that all such cases must be remanded as soon as those proceedings are complete: "Each action so transferred *shall be* remanded by the [JPML] at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated." *Id.* (emphasis added).

Despite this unequivocal statutory directive, district courts assigned to oversee coordinated pretrial proceedings have "routine[ly]" decided to retain those cases for all purposes, including trial. Pet. App. 31a (Kozinski, J., dissenting). Citing 28 U.S.C. § 1404(a), they have "transferred" these cases to *themselves,* preventing the cases from ever returning to their home district, as Congress intended. Section 1404(a) provides no support for this practice. By its terms, it authorizes transfer only "to any *other* district or division where it might have been brought" (emphasis added). It does not authorize a district court to transfer a case to itself.

Nonetheless, through repeated use of this "self-transfer" mechanism, the district courts have, in Judge Kozinski's words, "parlayed a narrow grant of authority to conduct consolidated discovery into a mechanism for systematically denying plaintiffs the right to trial in their forum of choice." Pet. App. 30a (Kozinski, J., dissenting). And they have accomplished this "remarkable power grab" (*id.*) without any protest from the courts of appeals, which have cited pragmatic considerations based on efficiency as a sufficient basis for self-transfer. In fact, the practice has been sanctioned by the JPML itself. The JPML's rules—which (unlike the Federal Rules of Civil Procedure) are not reviewed by this Court prior to becoming effective—expressly state that cases need not be remanded for trial where they have been "ordered transferred by the transferee judge to the transferee or other district." JPML Rule 14(b).

Such concerted disregard of a clear congressional mandate cries out for correction. Review by this Court is

necessary to align federal court practice with the plain language of sections 1404 and 1407 and to restore plaintiffs' traditional prerogative in choosing the forum for trial.

The Ninth Circuit's decision also presents a second issue of importance to the administration of justice. It is a fundamental premise of the Federal Rules of Civil Procedure that plaintiffs must have an opportunity to conduct discovery and substantiate their allegations before their claims may be dismissed for a failure of proof. In deciding a motion to dismiss under Rule 12(b)(6), therefore, a court must assume the truth of all the allegations in plaintiff's complaint. In this case, the Ninth Circuit rejected that bedrock rule as an outdated "formalism." Pet. App. 23a. The majority held that courts may go outside the four corners of the complaint and rely on public record materials—including, in this instance, the unsworn statements of a recused judge—to decide disputed questions of fact at the motion to dismiss stage. That understanding of the appropriate use of public records undermines the important role of Rule 12(b)(6) and directly conflicts with the law of other circuits.

A. Background and Prior Proceedings

1. Lexecon is one of the nation's leading law and economics consulting firms. Daniel Fischel is a principal of Lexecon and the Freeman Professor of Law and Business at the University of Chicago Law School. Professor Fischel frequently testifies as an expert in complex class action securities cases.

The respondents—two law firms [1] and certain individual members of those firms—are plaintiffs' class action lawyers. They have, in recent years, brought numerous, highly-publicized class action securities lawsuits. Professor Fischel provided what was characterized by many commentators—such as the Wall Street Journal—as decisive

[1] The two law firm defendants are Milberg Weiss Bershad Hynes & Lerach and Cotchett, Illston & Petrie.

testimony for the defense in a number of those suits, thereby costing defendants millions of dollars in contingency fees.

In 1992, Lexecon and Professor Fischel (jointly "Lexecon") filed this diversity action in the Northern District of Illinois, their home district, alleging that respondents—angered by this succession of costly losses—engaged in a wide-ranging effort to ruin Lexecon's reputation and put it out of business. The first step in respondents' scheme was to name Lexecon as a defendant in *Shields v. Keating*, a case heard in the District of Arizona as part of MDL No. 834, *American Continental Corporation/Lincoln Savings & Loan Litigation*. Respondents, who were class counsel in that case, falsely accused Lexecon of complicity with Charles Keating in one of the most notorious savings and loan scandals of this century. Respondents then used their *Lincoln Savings* complaint against Lexecon in courtrooms around the country, in the press, and with Lexecon's clients and business associates to portray Professor Fischel as a "crook" and a "racketeer" and Lexecon as a firm whose expert credentials could no longer be trusted. As a result, Lexecon lost millions of dollars in fees, and both petitioners suffered significant damage to their reputations.

2. In this suit, Lexecon seeks damages for respondents' malicious prosecution of the *Lincoln Savings* case, abuse of process, tortious interference with petitioners' existing and prospective client relationships, defamation, and commercial disparagement.

Initial pretrial matters in this case were handled by Judge Zagel in the Northern District of Illinois. Those proceedings did not go well for respondents. The district court rejected their personal jurisdiction arguments and indicated that it did not agree with some of their key legal contentions.

After six months of pretrial proceedings before Judge Zagel, respondents filed a motion with the JPML pursuant to 28 U.S.C. § 1407 to have this case transferred to the

District of Arizona and consolidated with the *Lincoln Savings* litigation that gave rise to some of Lexecon's claims. Before the JPML could rule on defendants' transfer motion, Judge Bilby, the presiding judge in the *Lincoln Savings* case, sent a letter to the JPML recusing himself from the *Lexecon* case because his "involvement" in the resolution of the underlying case would make it "improper" for him to act as a judge in the *Lexecon* case.

Notwithstanding Judge Bilby's recusal, respondents renewed their motion to transfer, asking the JPML to send the *Lexecon* case to any other judge in Arizona. Over Lexecon's objections, the JPML granted respondents' motion to transfer on the ground that there was an extensive document depository in Arizona and that there might be some opportunity for coordination with a still unfinished settlement involving one of the defendants in *Lincoln Savings*. Pet. App. 100a-102a. Once transferred to the District of Arizona, the case was assigned to Judge Roll, who had no previous familiarity with this matter or with any of the *Lincoln Savings* cases.

3. No coordinated proceedings ever ensued. The transfer did, however, have a significant impact on the course of the litigation. In particular, the district court, relying on its own "independent" evaluation of the merits of the *Lincoln Savings* suit against Lexecon—and not accepting the truth of the allegations contained in Lexecon's complaint—granted respondents' motion to dismiss as to the malicious prosecution and abuse of process claims. Pet. App. 85a-92a.

After this case had been in Arizona for a year, it had become abundantly clear that there would never be any "coordinated or consolidated" pretrial proceedings. Indeed, all other proceedings in MDL No. 834 had long since been concluded, and the only other factor cited by the JPML in ordering transfer—the presence of a "document depository" in Arizona—did not even exist any more. The documents that had been produced in this case—over a million pages worth—were being kept in

Illinois, and only one of the 42 deponents or potential deponents resided in Arizona. Thus, in accord with the procedures specified by the JPML (*see* JPML Rule 14(d)), Lexecon moved the Arizona district court to remand the case back to the Northern District of Illinois, where it had been filed. The district court deferred decision on that motion until the end of discovery, at which time Lexecon renewed its request to return the case to Illinois.

Respondents objected to the remand motion and filed their own motion to transfer the case permanently to Arizona. They also moved for summary judgment on all remaining issues. Without ruling on Lexecon's remand motion, the court granted summary judgment to respondents on all remaining issues, except for one aspect of Lexecon's defamation claim. Pet. App. 64a-77a.

Soon thereafter, the Arizona district court denied Lexecon's motion to remand and simultaneously granted respondents' request that it transfer the case permanently to itself. Pet. App. 61a-62a. Without mentioning the language of 28 U.S.C. § 1407, the court stated that there was "[s]ubstantial authority"—including JPML Rule 14(b)—establishing that section 1407 does not require a case to return to its original district after coordinated pretrial proceedings are complete. Pet. App. 61a. The court further concluded, again without mention of the relevant statutory language, that 28 U.S.C. § 1404 gave it the "power to transfer this action to itself." Pet. App. 61a.

4. Lexecon believed that the district court's actions in transferring this case to itself violated sections 1404 and 1407 and subjected the company to potentially irreparable harm—requiring it to go to trial in a forum thousands of miles from home where "there was much popular feeling" against companies that, like Lexecon, were alleged to have been involved in the Charles Keating/Lincoln Savings scandal. Pet. App. 47a (Kozinski, J., dissenting). Lexecon thus petitioned the Ninth Circuit for a writ of mandamus.

The Ninth Circuit held oral argument on the mandamus petition, but eventually determined that extraordinary relief was not warranted in this instance. Pet. App. 55a-60a. The two-judge majority did note, however, that Lexecon's legal position had considerable force. The majority explained that section 1407 provided an apparently "clear statutory mandate" and that the court "might well" decide on direct review that the district court's self-transfer decision was unlawful. Pet. App. 58a.

Judge Kozinski dissented from the refusal to issue a writ. He would have granted the petition to correct the district court's "egregious, oft-repeated error" in "disregard[ing] the statutory mandate" of sections 1404 and 1407. Pet. App. 58a, 59a (Kozinski, J., dissenting). Section 1407, in his view, represented an "important policy choice"—allowing limited transfers, but retaining plaintiffs' "ancient right" to select a forum for trial—that "federal judges are bound to respect." Pet. App. 60a; *see* 15 Wright, Miller & Cooper, *Federal Practice & Procedure* § 3867, at 111 (Supp. 1996) (discussing Judge Kozinski's mandamus dissent).

5. The trial on the defamation claim—a claim that was governed by Illinois law—then went forward in the District of Arizona. The respondents prevailed in a jury trial, and the district court entered final judgment.

B. The Decision Below

On appeal from that judgment, a different and sharply divided panel of the Ninth Circuit affirmed the district court's rulings in all respects. Judge Kozinski was the only member of this panel who had also ruled on the mandamus petition.

1. The majority, relying on "longstanding practice and the efficiency arguments" in favor of self-transfer (Pet. App. 14a), found no flaw in the district court's decision to transfer this case to itself. Such transfers, the majority stated, are authorized both by the JPML's rules and by a

long series of court of appeals and district court decisions. Pet. App. 12a & n.3 (collecting cases). The majority further concluded that, in the multidistrict litigation context, the judicial interest in "efficien[t]" disposition of cases "trump[s]" the "usual deference to a plaintiff's choice of forum." Pet. App. 13a & n.5. Finally, the majority suggested that section 1407 is concerned only with the powers of the JPML and thus does not disturb the "traditional powers of the district court to which a case has been transferred." Pet. App. 15a.

The majority also affirmed the district court's dismissal of Lexecon's malicious prosecution and abuse of process claims. It rejected as "absurdly formal" the requirement that a district court confine its review at the motion to dismiss stage to the allegations in Lexecon's complaint. Pet. App. 23a. Rather, in the majority's view, it was appropriate for the district court to consider the "public record" in resolving disputed factual questions at that stage. *Id.* Applying that logic here, the majority held that Lexecon's claims failed because, notwithstanding the allegations in Lexecon's complaint, the record in *Lincoln Savings* showed as a matter of fact that (1) *Lincoln Savings* did not result in a "termination" favorable to Lexecon and (2) naming Lexecon as a defendant in the *Lincoln Savings* suit did not have as its "*primary purpose* to inflict harm" on the company. Pet. App. 24a, 28a.

2. Judge Kozinski again dissented. Adding flesh to his earlier opinion, he stressed once more that self-transfer is a remarkably common, but thoroughly improper, practice. This practice, he emphasized, conflicts both with the plain terms of section 1407 and with Congress's explicit intent *not* to authorize section 1407 transferee courts to conduct trials. Pet. App. 30a-31a (Kozinski, J., dissenting). Nor could the district court's course of action be reconciled with section 1404(a), whose text states "in plain and simple terms" that a case may be transferred only to " 'any *other* district or division where

it might have been brought.'" Pet. App. 41a (Kozinski, J., dissenting) (quoting section 1404(a)). By upholding the practice of self-transfer in the face of such clear statutory language and legislative history, the majority had "complete[d] the judicial arrogation of power in this area and put the last coffin nail into the experiment Congress started in 1968 when it gave the federal courts only a limited MDL authority." Pet. App. 52a (Kozinski, J., dissenting).

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT'S DECISION RATIFIES AN ENTRENCHED FEDERAL COURT PRACTICE THAT IS DIRECTLY CONTRARY TO THE PLAIN LANGUAGE OF THE RELEVANT STATUTES AND THAT UNDERMINES CONGRESS'S EXPRESS INTENT TO PRESERVE PLAINTIFFS' CHOICE OF FORUM

The lower federal courts have illegitimately converted the multidistrict litigation statute into a mechanism for shuttling entire cases off to far-flung districts for trial in forums that plaintiffs would never have chosen. Although over 92,000 cases have been transferred in the past three decades under section 1407, only 3,500—less than four percent—have ever returned to their home district. *See* Pet. App. 30a (Kozinski, J., dissenting) (citing Administrative Office of United States Courts, *Judicial Business of the United States Courts: 1995 Report of the Director* 32). The stark reality is that "once a case is sucked into the MDL vortex, it seldom comes back." Pet. App. 45a (Kozinski, J., dissenting).

To be sure, some cases have not returned to their home districts because they settled or were dismissed while consolidated pretrial proceedings were still underway. Many others, however, have not returned because the district court assigned to oversee pretrial proceedings decided to retain the case for all purposes, including

trial. As Judge Kozinski explained, federal judges have "develop[ed] proprietary feelings toward the cases entrusted to them" and have "routine[ly]" refused to relinquish them at the end of pretrial proceedings. Pet. App. 31a. Thus, in the multidistrict litigation context, plaintiff's choice of forum—which, under traditional principles, "should rarely be disturbed" (*Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947))—has "devolved to the significance of a tailbone or an appendix." Pet. App. 44a (Kozinski, J., dissenting).

This practice of "self-transfer" cannot be reconciled with the language of either section 1407 or section 1404. It is directly contrary to all evidence of Congressional intent and to the historical rights of plaintiffs to choose their forum for trial. And it has been uniformly criticized by a host of scholarly commentators as a usurpation of legislative authority by the courts. The very fact that the practice is now so entrenched—notwithstanding clear contrary directions from Congress—compels this Court's review.

a. It is well established that courts must follow the plain language of a statute and may not depart from its "ordinary English" to pursue their own ideas of wise policy. *Barnett Bank of Marion County, N.A. v. Nelson*, 116 S. Ct. 1103 (1996). *See also Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992) ("courts must give effect to the clear meaning of statutes as written").

Section 1407(a)'s language is "clear as sunlight," (Pet. App. 30a (Kozinski, J., dissenting)), and its meaning could not be more obvious. It authorizes transfers only for "coordinated or consolidated pretrial proceedings." 47 U.S.C. § 1407(a). *See In re Korean Air Lines Disaster*, 829 F.2d 1171, 1174 (D.C. Cir. 1987) (R.B. Ginsburg, J.) (section 1407 "authoriz[es] transfers *only* for pretrial purposes") (emphasis added), *aff'd on other grounds*, 490 U.S. 122 (1989).

If a case has not been concluded by the time such pretrial proceedings are over, it *must* be returned to the district where it was initially filed: "Each action so transferred *shall be remanded* by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated." 28 U.S.C. § 1407(a) (emphasis added). Transferee courts thus have no authority under section 1407(a) to retain a case once pretrial proceedings conclude. The statute states that the case "shall be remanded," and remanded it must therefore be.

This clear statutory command is reinforced by the language of section 1404(a). As noted above, that provision only authorizes a district court to transfer a case to "any *other* district." 28 U.S.C. § 1404(a) (emphasis added). There is no way, in ordinary English, that the court granting such a transfer can itself be considered an "other" district court. The practice of self-transfer is therefore also inconsistent with the plain language of section 1404(a).

Moreover, if one looks beyond the plain text of the relevant statutes to their legislative history, it becomes even clearer that the lower court practice is flatly at odds with the Congressional design. The drafting history of section 1407 demonstrates that Congress specifically rejected the idea of authorizing broader transfers in the multidistrict context. The House Conference Report, for instance, gives several reasons—including the fact that "trial in the originating district is generally preferable from the standpoint of the parties and witnesses"—why the statute "does *not* . . . include the trial of cases in the consolidated proceedings" and would "not affect the place of trial in any case." H.R. Rep. No. 1130, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. 1898, 1900, 1901 (emphasis added). If "future experience" demonstrated that "consolidation and coordination for

trial purposes" was justified, "amendments to the present language" would be necessary. *Id.* at 1902.[2]

This legislative history, moreover, is reinforced by the federal judicial report that was the genesis for the new statute. The Co-Ordinating Committee on Multiple Litigation, the body that proposed section 1407, emphasized that the proposed provision would not disturb the plaintiff's choice of forum for trial. The Committee's Report stated unequivocally that "[t]he major innovation proposed is transfer solely for pre-trial purposes," which would achieve "efficien[cy] and econom[y] . . . without losing the benefits of local trials in the appropriate districts." *In re Plumbing Fixture Cases,* 298 F. Supp. 484, 499 (J.P.M.L. 1968) (reprinting the Report).

It is thus evident that Congress—based on representations made by the federal judiciary as to how section 1407 would be read—made an explicit decision *not* to authorize transferee courts to hold trials, unless and until the legislature revisited the issue and amended the statute. Once the statute was passed, however, "the lower federal courts [did] by judicial fiat what Congress refused to do by statute in 1969: amend section 1407 to allow transfers for trial." Robert H. Trangsrud, *Joinder Alternatives in Mass Tort Litigation,* 70 Cornell L. Rev. 779, 809 (1985). *See United States v. Noland,* 116 S. Ct. 1524, 1528 (1996) (where Congress "could have, but did not"

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[2] The Ninth Circuit's opinion incorrectly suggests that the legislative history supports its conclusion. Pet. App. 15a. The court's analysis rests on highly selective quotations from passages in which Congress noted that the statute did not do away with other mechanisms for transfer, such as section 1404. *Id.* As Judge Kozinski explained (Pet. App. 39a-40a n.8), the quoted passages, when read in context, clearly refer to the possibility of transfer by the court in which the case was filed, *not* by the transferee court. For instance, immediately following one passage quoted by the majority (Pet. App. 15a), the House Report makes clear that a further amendment would be necessary to allow the transferee court to keep the case for all purposes. *See* 1968 U.S.C.C.A.N. at 1902.

make a certain determination, "courts [can]not take it upon themselves" to make that same determination).

Given the abundant evidence establishing that self-transfer is fundamentally incompatible with the language and intent of sections 1404 and 1407, it is hardly surprising that commentators have uniformly criticized this practice. Professors Wright, Miller, and Cooper have stated, with characteristic understatement, that the practice is of "questionable" legitimacy. 15 Wright, Miller & Cooper, *Federal Practice & Procedure* § 3866, at 619 (2d ed. 1986). Other independent observers concur in more forceful terms.[a] As Judge Kozinski noted, "[r]e-

[a] Robert H. Trangsrud, *supra*, 70 Cornell L. Rev. at 804 ("The reasoning in these cases is demonstrably wrong."); Ross D. Cooper, *The Korean Air Disaster: Choice of Law in Federal Multidistrict Litigation*, 57 Geo. Wash. L. Rev. 1145, 1159 (1989) (practice of self-transfer "does not comport with the express language of section 1407 or section 1404 or with section 1407's legislative history"); Mike Roberts, *Multidistrict Litigation and the Judicial Panel, Transfer and Tag-Along Orders Prior to a Determination of Remand: Procedural and Substantive Problem or Effective Judicial Public Policy?*, 23 Mem. St. U. L. Rev. 841, 866 (1993) ("It is a leap in logic to conclude that causes of action not terminated upon dispositive motions should be retained in the transferee court under the rubric of § 1404(a), when the statutory language of § 1407 explicitly directs remand to the transferor court."); *Report of the American Bar Association Section of Antitrust Law Task Force to Review the Supreme Court's Decision in California v. ARC America Corp.*, 59 Antitrust L.J. 271, 302 (1990) ("[T]he use of Section 1404(a) transfers to consolidate multidistrict cases for trial is of dubious legal validity."); Blake M. Rhodes, Comment, *The Judicial Panel on Multidistrict Litigation: Time for Rethinking*, 140 U. Penn. L. Rev. 711, 734 (1991) ("[A] transferee court's use of § 1404(a) sets Congress's carefully crafted plan for multidistrict litigation on its head."); Stanley J. Levy, *Complex Multidistrict Litigation and the Federal Courts*, 40 Fordham L. Rev. 41, 64 (1971) (the language and legislative history of section 1407(a) are so clear that it "originally appeared to be a futile exercise for a 1407 transferee court to rule on a 1404 transfer motion"); John F. Cooney, Comment, *The Experience of Transferee Courts Under the Multidistrict Litigation Act*, 39 U. Chi. L. Rev. 588, 606 (1972) ("[T]he apparently mandatory nature of the remand clause

search discloses not a single commentator who has examined the question and found statutory support for the position taken by the federal courts." Pet. App. 36a (Kozinski, J., dissenting).

b. The Ninth Circuit gave three reasons in support of the result it reached. None withstands scrutiny.

First, the Ninth Circuit suggested that "longstanding practice" was itself a sufficient justification for self-transfer. Pet. App. 14a, 16a. The panel noted that "[r]espect for our brethren" made it reluctant to "accuse the JPML of violating the statute that created it" or to second-guess the many courts that had engaged in self-transfer. Pet. App. 14a n.7, 16a.

But past practice is no excuse for ignoring a clear Congressional command. As this Court recently recognized, the existence of long-standing errors in statutory interpretation requires action, not "hesitation," because "'[a]ge is no antidote to clear inconsistency with a statute.'" *Metropolitan Stevedore Co. v. Rambo*, 115 S. Ct. 2144, 2149 (1995) (quoting *Brown v. Gardner*, 115 S. Ct. 552, 557 (1994) (finding 60-year old agency interpretation inconsistent with statute)). Essentially, the Ninth Circuit is suggesting that, even if two wrongs don't make a right, two decades worth will—or at least we should pretend that they do, notwithstanding a clear conflict with an express statutory command. That has never been, nor should it be, the law.

Nor does the existence of a JPML rule permitting self-transfer transform an unlawful practice into a lawful one. Congress expressly provided that the JPML's rules must be consistent with its enabling statute and, indeed, all of

. . . implies that transferee courts lack this jurisdiction [to grant a section 1404 motion]."); George T. Conway III, Note, *The Consolidation of Multistate Litigation in State Courts*, 96 Yale L.J. 1099, 1102-03 (1987) ("[C]onsolidation for trial almost certainly defies both the letter of section 1407 and the intent of its drafters.") (internal footnote omitted).

federal law. 28 U.S.C. § 1407(f). *See also Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 212-14 (1976) (agency rules "cannot exceed the power granted . . . by Congress"); *Johnson v. Manhattan Ry.*, 289 U.S. 479, 503 (1933) (invalidating local court rule that was inconsistent with powers granted by Congress).

Section 1407, which circumscribes the authority of the JPML, unequivocally states that a transfer is only for "coordinated or consolidated pretrial proceedings" and that each case "shall be remanded" following pretrial proceedings "unless it shall have been previously terminated." 28 U.S.C. § 1407(a). The JPML rule violates this express statutory command. It states that "[e]ach transferred action that has not been terminated in the transferee district court shall be remanded . . . *unless ordered transferred by the transferee judge to the transferee or other district.*" JPML Rule 14(b) (emphasis added). The italicized language simply rewrites the JPML's enabling statute and adds an excuse for failure to remand that the statute does not recognize and does not permit.

Second, the Ninth Circuit noted that self-transfer "strongly promotes judicial efficiency, which was a primary purpose of the legislation that created the JPML." Pet. App. 16a. But, again, this Court has made clear that such concerns do not justify federal courts' disregard for the plain meaning of the statutes that define their authority. In *Finley v. United States*, 490 U.S. 545 (1989), for example, the Court acknowledged that the exercise of so-called pendant-party jurisdiction over state claims resulted in "efficiency and convenience" by allowing for the consolidation of related issues in a single proceeding. *Id.* at 555. Nevertheless, because the plain meaning of the relevant statutes demonstrated that Congress had not granted federal courts any such authority, the Court held that they lacked the power to hear such pendant-party claims. *See id.* at 547 (" 'courts which are created by written law, and whose jurisdiction is defined by written

law, cannot transcend that jurisdiction' ") (quoting *Ex Parte Bollman*, 4 Cranch 75, 93 (1807) (Marshall, C.J.)).

Congress established the balance between efficiency concerns and plaintiffs' traditional choice of forum when it wrote section 1407. The judiciary is not free to strike a different balance. As in *Finley*, the lower courts may not "trump" (Pet. App. 13a n.5) the plain language of sections 1404 and 1407—which evince Congress's judgment that preserving plaintiffs' choice of forum for trial is more important than efficiency—based on their own notions of wise judicial administration. *See also Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 126 (1989) (Court is not free to pursue policy objective at expense of "unnatural" textual interpretation; "[o]ur task is to apply the text, not to improve upon it").

Third, the Ninth Circuit argued that section 1407's obligation to remand applies only to the JPML, not to the transferee court. Pet. App. 15a. On this theory, a transferee court is free to transfer a case to itself for trial pursuant to section 1404(a) without regard to the JPML's express duty under section 1407(a) to remand the case before trial. Pet. App. 15a-16a.

But the district court's power to preside in a transferred case is itself circumscribed by section 1407. The transferee court is assigned the case only for the limited purpose of conducting "consolidated" pre-trial proceedings. It cannot expand its power beyond what Congress has granted under the express terms of the statute. For that reason, the transferee court must remand the case once consolidated pretrial proceedings are complete and its authority under section 1407(a) has thus expired.

Moreover, the JPML's own rules instruct litigants to seek a remand, in the first instance, from the transferee court. *See* JPML Rule 14(d). This makes sense, since it is the judge presiding over the case, not the JPML panel, who will know when consolidated pre-trial proceedings are over and, thus, when the case must be remanded.

But in executing that delegated responsibility, the district court necessarily has the same underlying statutory obligation that the JPML would have if it handled requests in the first instance. The JPML cannot alter or broaden its authority by delegating it.[4]

Nor can the transferee court use its general authority under section 1404(a) to render a nullity section 1407(a)'s specific requirement that a case be remanded. It is a fundamental canon of statutory construction that laws should not be read in a way that makes any statutory provision superfluous. *See, e.g., Lane v. Peña*, 116 S. Ct. 2092, 2100 (1996); *Connecticut National Bank v. Germain*, 503 U.S. 249, 253 (1992). Yet if the district court could transfer a case pursuant to section 1404(a), then section 1407(a)'s requirement that the case be remanded at the conclusion of consolidated proceedings would serve no purpose at all. Congress provided only one exception to the JPML's mandatory duty to remand the case at the end of consolidated proceedings—where the case is "terminated" during coordinated pretrial proceedings. Congress did not create an exception for transfers; indeed, a statutory "command" that effectively said "the case shall be remanded unless it is transferred" (*i.e.*, unless it is not remanded) would be nonsensical.

[4] For this reason, it is bizarre for the Ninth Circuit to suggest (Pet. App. 16a-17a) that Lexecon should have sought relief directly from the JPML and that its failure to do so somehow left the district court with no choice but to transfer the case to itself "to avoid the absurdity of indefinitely suspended litigation, the pretrial proceedings of which have come to a close." Under the JPML's own rules, the proper practice was for Lexecon to bring its section 1407 argument to the district court, and not the JPML, in the first instance. Once the district court denied the remand motion, Lexecon was unable to pursue the matter with the JPML because the district court simultaneously transferred the case to itself, thereby depriving the JPML of authority to rule. *See* JPML Rule 14(b). Lexecon accordingly sought mandamus, which was the only immediate remedy available to it to vindicate the requirement of section 1407(a). Moreover, Lexecon objected to the self-transfer on the additional ground that it violated the express terms of section 1404(a).

Finally, even if section 1404(a)'s general transfer authority could somehow nullify the specific remand requirement of section 1407(a), the Ninth Circuit's ruling permitting *self*-transfer would still collide head-on with the plain language of section 1404(a). As we have explained, that provision authorizes a court to transfer a case only to some "other district or division," not to itself. Section 1404(a) thus provides a completely independent reason why the court of appeals' decision—and, indeed, all the lower court rulings on this issue—cannot pass muster.

c. The absence of a circuit conflict, though often a basis for denying review, in this case points in the other direction. The very fact that the judicial highjacking of JPML cases is so entrenched provides a powerful reason for this Court to intervene.

As early as 1971, the Second Circuit upheld a district court's self-transfer decision against a claim that it violated section 1407. *See Pfizer, Inc. v. Lord*, 447 F.2d 122, 124-25 (2d Cir. 1971). In the years since, the JPML itself has issued a rule that expressly contemplates self-transfer, and the lower courts, relying on that rule and on the perceived efficiency benefits of self-transfer, have uniformly determined that such transfers are lawful. The array of lower court precedent on this point now includes three square circuit court holdings,[5] as well as a host of district court rulings.[6] Indeed, the lower courts' under-

[5] In addition to the Second and Ninth Circuits, the Third Circuit so held in *In re Fine Paper Antitrust Litig.*, 685 F.2d 810, 819-20 & n.7 (3d Cir. 1982), *cert. denied*, 459 U.S. 1156 (1983) Two other appellate court decisions assume that self-transfer authority exists. *See In re Food Lion, Inc., Fair Labor Standards Act Litig.*, 73 F.3d 528, 532 n.7 (4th Cir. 1996); *Kohr v. Allegheny Airlines*, 504 F.2d 400, 402 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975).

[6] *See, e.g., In re Tax Refund Litig.*, 723 F. Supp. 922, 924 (E.D.N.Y. 1989); *In re Air Crash Disaster at Stapleton Int'l Airport, Denver, Colo.*, 720 F. Supp. 1455, 1458 (D. Colo. 1988); *In re Dow Co. "Sarabond Products" Liab. Litig.*, 664 F. Supp. 1403, 1403-04 (D. Colo. 1987); *In re Air Crash Disaster at John F. Kennedy Int'l Airport*, 479 F. Supp. 1118, 1122-23 (E.D.N.Y. 1978); *In re Caesars Palace Sec. Litig.*, 360 F. Supp. 366, 374 (S.D.N.Y.

standing on this point is now so thoroughly entrenched that the Federal Judicial Center's *Manual for Complex Litigation (Third)* treats self-transfer as standard procedure. *See id.* § 21.61, at 117 & n.346.

As already noted, the existence of such longstanding errors in statutory interpretation requires action, not "hesitation," by this Court. *Metropolitan Stevedore*, 115 S. Ct. at 2149. This Court has accordingly granted review to address such errors in interpretation even where *every* circuit court's precedents upheld the practice at issue. *See Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 114 S. Ct. 1439 (1994); *id.* at 1456 (Stevens, J., dissenting) (practice addressed by Court had been upheld "in *hundreds* of judicial and administrative proceedings in every circuit in the federal system"). *See also Finley*, 490 U.S. at 558 (Stevens, J., dissenting) (district court practice reviewed—and reversed—by Court had been supported by "overwhelming consensus of federal judges").

The statutory question in this case particularly merits the Court's attention because it involves the limits of the authority that Congress has granted to the lower federal courts. As the Court has recognized since its earliest days, ensuring that the federal courts stay within the bounds of the authority Congress has vested in them is an issue of paramount importance. *See Ex Parte Bollman, supra.* Indeed, in recognition of this principle, just last Term the Court reviewed a case involving the statutory scope of federal court authority even though only one circuit had ever passed on the statutory question at issue. *See Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 116 S. Ct. 637 (1996) (ruling upon federal court authority under the Expedited Funds Availability Act). And review of such questions is especially warranted where the federal court practice has a significant effect on the substantive rights of a wide class of litigants—in this instance, by robbing multidistrict litigation plaintiffs of their historical right to choose their forum and subjecting them to trial in distant places before potentially hostile juries.

1973); *In re Aircrash Near Duarte, Cal.*, 357 F. Supp. 1013, 1015 (C.D. Cal. 1973); *Greyhound Computer Corp. v. I.B.M. Corp.*, 342 F. Supp. 1143, 1145 (D. Minn. 1972); *In re Viatron Computer Systems Corp. Litig.*, 86 F.R.D. 431, 432-33 (D. Mass. 1980); *In re Master Key Antitrust Litig.*, 70 F.R.D. 23, 28 (D. Conn. 1975); *In re Penn Central Commercial Paper Litig.*, 62 F.R.D. 341, 345 (S.D.N.Y. 1974), *aff'd sub nom. Shulman v. Goldman, Sachs & Co.*, 515 F.2d 502 (2d Cir. 1975).

II. THE NINTH CIRCUIT'S RULING WRONGLY AUTHORIZES DISTRICT COURTS TO GO OUTSIDE THE FOUR CORNERS OF A COMPLAINT AND RELY ON THEIR OWN ANALYSIS OF PUBLIC RECORD MATERIALS TO DECIDE DISPUTED QUESTIONS OF FACT AT THE MOTION TO DISMISS STAGE

The Ninth Circuit's ruling also implicates important public policy concerns regarding the integrity of the legal profession. Respondents are the nation's leading filers of securities class action suits. In enacting the Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, 109 Stat. 737 (1995), with bipartisan majorities in both houses, Congress emphasized the serious societal problems and injuries to innocent parties caused by unethical class action lawyers. *See* H.R. Conf. Rep. No. 369, 104th Cong., 1st Sess. 31-32 (1995). *See also* 141 Cong. Rec. S8894 (daily ed. June 22, 1995) ("it has become increasingly clear that securities class actions are extremely vulnerable to abuses by entrepreneurs masquerading as lawyers") (remarks of Sen. Dodd).

Here, Lexecon alleged that respondents fabricated evidence to support claims that they privately acknowledged were baseless, attempted to use their meritless suit in an attempt to extort concessions from Lexecon and its clients, intimidated witnesses, defrauded the courts, and then engaged in wholesale document destruction to cover-up their misconduct. These are serious allegations, of more than private concern, that should not have been rejected without careful consideration on the merits as required by

the Federal Rules of Civil Procedure and this Court's precedents.

This Court established long ago that, in ruling on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a court must accept the truth of all allegations in the plaintiff's complaint. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 411 n.2 (1986) (collecting cases). The text of Rule 12 itself makes plain that courts may not stray beyond the four corners of the pleadings to resolve such motions: "If . . . matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment . . . and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

The Ninth Circuit, however, discarded these fundamental procedural protections as outmoded "formalism." Pet. App. 23a. In the court's view, it is perfectly appropriate for a court to use any material in the "public record"—which could include, for example, newspaper articles, investigative reports, and all sorts of public filings by private parties—as a basis for rejecting, at the motion to dismiss stage, the factual assertions in a plaintiff's complaint. *Id.* This ruling conflicts with decisions in other circuits and threatens to eviscerate the traditional protection afforded plaintiffs by Rule 12(b)(6).

a. The Ninth Circuit affirmed the dismissal of Lexecon's malicious prosecution claim and its abuse of process claim. In both instances it went beyond the four corners of the complaint to resolve disputed issues of fact.

Under Arizona law, a necessary element of Lexecon's malicious prosecution claim was that the *Lincoln Savings* case had terminated favorably to Lexecon. Under Arizona law, favorable termination is a question of fact.[7] Lexecon's

[7] *See Bradshaw v. State Farm Mut. Auto. Ins. Co.*, 758 P.2d 1313, 1319 (Ariz. 1988); *Frey v. Stoneman*, 722 P.2d 274, 279 (Ariz. 1986).

complaint accordingly detailed the circumstances leading up to the dismissal of Lexecon from that suit and why those circumstances demonstrated that the suit terminated favorably to Lexecon. Lexecon C.A. Excerpts 68-75, 89.

After Lexecon's complaint was filed in Chicago, Judge Bilby, who had presided over the earlier *Lincoln Savings* case in Arizona, somehow obtained a copy and read it "more out of intellectual curiosity than anything." Milberg Weiss C.A. Excerpts 359. Judge Bilby then issued an extraordinary "order" (*see* Pet. App. 7a-8a n.2) describing why he disagreed with certain factual allegations in Lexecon's Chicago complaint concerning Lexecon's dismissal from the *Lincoln Savings* case.[8] Judge Bilby stated that the purpose of his order was to give "the judge in Chicago . . . something to rely upon." Milberg Weiss C.A. Excerpts 441. Judge Bilby recognized that his recollection of various off-the-record events made him a potential witness in the Lexecon case in Chicago, but stated "that ain't going to happen." *Id.* at 437. Moreover, when the *Lexecon* case later came before the JPML, Judge Bilby sent the JPML a letter recusing himself because of his "involvement" in resolving the underlying case.

The Ninth Circuit held that the factual characterizations of the *Lincoln Savings* litigation in Judge Bilby's order "plainly indicated that the litigation was not 'terminated' in Lexecon's favor." Pet. App. 22a. Yet, as Judge Kozinski noted below, that "order" amounted to "little more than testimony" by a recused judge who was not present during key events described in Lexecon's complaint and whose statements were not "subject to the

[8] The crux of Judge Bilby's disagreement with Lexecon's Chicago complaint focused on the circumstances surrounding Lexecon's decision to return its professional fees of approximately $700,000 from its Lincoln Savings engagement, which it first announced four months *after* its dismissal from *Lincoln Savings*. In his order, Judge Bilby expressed his view, contrary to the allegations in Lexecon's complaint and what Judge Bilby himself said at the time he dismissed Lexecon as a "non-settling defendant," that this payment was a disguised quid pro quo for Lexecon's earlier dismissal from *Lincoln Savings*.

normal safeguards applicable to witnesses." Pet. App. 47a n.16 (Kozinski, J., dissenting).

The treatment of Lexecon's abuse of process claim was even more extraordinary. Here, the Ninth Circuit itself purported to make findings of fact. Under Arizona law, an abuse of process claim requires proof that legal process was used primarily to accomplish a purpose for which it was not designed. The complaint alleged that respondents brought suit against Lexecon in an attempt to ruin Lexecon's reputation and destroy Professor Fischel's credibility as an expert witness. Lexecon was prepared to substantiate those allegations, but was never given an opportunity to do so.

The Ninth Circuit panel stated:

> [T]he task of this court is to determine whether the addition of Lexecon as a defendant in the [*Lincoln Savings*] litigation had as its primary purpose an objective for which that litigation was not intended [*i.e.*, "to inflict harm on Lexecon or Fischel"]. We hold that no such objective existed . . . .

Pet. App. 27a, 28a. The panel, of course, had no such task. The job of a court in dealing with a 12(b)(6) motion is not to make findings of fact, but to determine whether the *allegations* in the complaint, which the court must assume to be true, are sufficient to state a claim.

If factual disputes—particularly disputes about motive—can be decided *conclusively* at the motion to dismiss stage based on a court's own analysis of public record materials, plaintiffs have no assurance that they will ever have an opportunity to prove their case. The Ninth Circuit asked rhetorically: "[W]hy should the district court be limited by Lexecon's selective telling of a story?" Pet. App. 23a. But that is what pleading is all about. Lexecon gets a chance to tell its side of the story, and the court *must* assume the truth of that story for purposes of a 12(b)(6) motion.

b. In sharp contrast to the Ninth Circuit's decision, other courts of appeals have placed careful limits on the practice of going beyond the four corners of the complaint at the motion to dismiss stage. In particular, they have made clear that public record materials may be considered on a 12(b)(6) motion only when the facts in the public record are so clearly established that they can properly be the subject of judicial notice. *See, e.g., Lovelace v. Software Spectrum Inc.*, 78 F.3d 1015, 1017-18 (5th Cir. 1996); *Winchester Homes, Inc. v. Osmose Wood Preserving, Inc.*, 37 F.3d 1053, 1054 (4th Cir. 1994); *Henson v. CSC Credit Servs.*, 29 F.3d 280 (7th Cir. 1994); *Allen v. Westpoint-Pepperell, Inc.*, 945 F.2d 40, 44 (2d Cir. 1991).

In those courts, public record evidence may be used at the motion to dismiss stage only if the relevant issue is "not subject to reasonable dispute." Fed. R. Evid. 201(b); *see Lovelace*, 78 F.3d at 1018 (court may look to SEC filings at motion to dismiss stage to determine their contents, a matter not subject to dispute, but may not determine at that stage whether those contents are truthful; citing Fed. R. Evid. 201); *Americanos v. Carter*, 74 F.3d 138, 141 (7th Cir.) (court could take notice of facts that were "easily ascertainable" from the face of a state statute), *cert. denied*, 116 S. Ct. 1853 (1996). The evidence relied upon by the Ninth Circuit here—particularly the after-the-fact perceptions of one participant in the earlier litigation—was plainly subject to reasonable dispute. Thus, these courts would not have reached the conclusion that the Ninth Circuit did here.

Indeed, application of these standards has led the Sixth Circuit to reach a conclusion directly contrary to the Ninth Circuit's on facts similar to those presented here. In *Friedman v. United States*, 927 F.2d 259 (6th Cir. 1991), the district court, in deciding a motion to dismiss, had relied on a prior decision to supply a "factual basis to consider whether plaintiff had a valid claim." *Id.* at

261. Unlike the Ninth Circuit—which sanctioned just such behavior here—the Sixth Circuit concluded that the court should not have noticed such contested facts at the motion to dismiss stage. *Id. See also Newman & Schwartz v. Asplundh Tree Expert Co.*, 102 F.3d 660, 662 (2d Cir. 1996) (concluding that district court "improperly relied upon extra-complaint information" to resolve a disputed issue on a 12(b)(6) motion); *Baker v. Putnal*, 75 F.3d 190, 197 (5th Cir. 1996) (reversing district court's order dismissing plaintiff's complaint on grounds that it failed to accept as true plaintiff's factual allegations and adopted, instead, evidence outside the pleadings "as fact without acknowledging any contradiction with the complaint").

The Ninth Circuit's decision to rely upon public record evidence to resolve the disputed question of motive is particularly remarkable. This Court has long established that determinations as to motive normally require credibility determinations of the kind that can only be made after trial. *See United States v. Yellow Cab Co.*, 338 U.S. 338, 341 (1949) ("Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them."); *see also Pullman-Standard v. Swint*, 456 U.S. 273, 287-93 (1982). Accordingly, other circuit courts have made clear that motive determinations are generally not suitable for resolution even at summary judgment, much less on Rule 12(b)(6) motion. *See, e.g., Leonard v. Frankfort Elec. & Water Plant Bd.*, 752 F.2d 189, 194 (6th Cir. 1985) ("questions of intent or motive are particularly ill-suited for disposition on summary judgment"); *Triad Assocs. v. Robinson*, 10 F.3d 492, 497 (7th Cir. 1993) (allegations of intent need only be pleaded generally and satisfy "notice pleading minimum" to survive motion to dismiss).

"Formalism has its place," the Ninth Circuit stated, "but that place is not here." Pet. App. 23a. In fact, it is precisely here—in judging a motion to dismiss a well-

pleaded complaint—that formalism does have its place as a critical protection for plaintiffs who have not yet been afforded a chance to prove their case. The Court should accordingly grant certiorari to resolve the intercircuit conflict on the appropriate use of public records at the motion to dismiss stage and to restore Rule 12(b)(6)'s traditional protections to plaintiffs.[9]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 18, 1997

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[9] If the Court grants certiorari and reverses on the first issue, then the Ninth Circuit's decision on the 12(b)(6) issue will have no further force and effect and the Court need not, if it so chooses, reach that issue. The case will essentially recommence in Chicago from the date it should have been remanded and the Arizona court's 12(b)(6) ruling will become interlocutory. As a result, any appellate review of the 12(b)(6) decision will take place in the Seventh Circuit and, if necessary, be subject to review by this Court at that time.

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-15759

D.C. No. CV-93-01087-JMR

IN RE: AMERICAN CONTINENTAL CORPORATION/LINCOLN SAVINGS & LOAN SECURITIES LITIGATION

LEXECON INC.; DANIEL R. FISCHEL,
Plaintiffs-Appellees,

v.

MILBERG WEISS BERSHAD HYNES & LERACH, a partnership; PATRICK COUGHLIN; WILLIAM S. LERACH; KEVIN P. RODDY; LEONARD B. SIMON; MELVYN I. WEISS; PATRICIA HYNES; MICHAEL C. SPENCER; STEPHEN R. STEINBERG,
Defendants-Appellees.

No. 95-16403

D.C. No. CV-93-01087-JMR

IN RE: AMERICAN CONTINENTAL CORPORATION/LINCOLN SAVINGS & LOAN SECURITIES LITIGATION

LEXECON INC.; DANIEL R. FISCHEL,
Plaintiffs-Appellants,

v.

MILBERG WEISS BERSHAD HYNES & LERACH, a partnership; PATRICK COUGHLIN; WILLIAM S. LERACH; KEVIN P. RODDY; LEONARD B. SIMON; MELVYN I. WEISS; PATRICIA HYNES; MICHAEL C. SPENCER; STEPHEN R. STEINBERG, COTCHETT, ILLSTON & PITRE; JOSEPH COTCHETT, SUSAN ILLSTON,
Defendants-Appellees,

Nos. 95-16595; 95-16754

D.C. No. CV-93-01087-JMR

IN RE: AMERICAN CONTINENTAL CORPORATION/LINCOLN SAVINGS & LOAN SECURITIES LITIGATION

LEXECON INC.; DANIEL R. FISCHEL,
Plaintiffs-Appellants,
Cross-Appellees,

v.

MILBERG WEISS BERSHAD HYNES & LERACH, a partnership; PATRICK COUGHLIN; WILLIAM S. LERACH; KEVIN P. RODDY; LEONARD B. SIMON; MELVYN I. WEISS; PATRICIA HYNES; MICHAEL C. SPENCER; STEPHEN R. STEINBERG,
Defendants-Appellees,
Cross-Appellants.

Appeals from the United States District Court
for the District of Arizona
John M. Roll, District Judge, Presiding

Argued and Submitted
June 13, 1996—San Francisco, California

Filed December 20, 1996

Before: Joseph T. Sneed, Harry Pregerson, and Alex Kozinski, Circuit Judges.

Opinion by Judge Sneed;
Dissent by Judge Kozinski

OPINION

SNEED, Circuit Judge:

Of the many consequences of the failure of Lincoln Savings and Loan and its parent, American Continental Corporation, the litigation that produced these consolidated appeals was just one. At the heart of these appeals is a suit by Lexecon Inc. against a number of the attorneys who represented the consolidated class of investors who lost money in the collapse of Lincoln Savings and its parent. Lexecon is a law and economies consulting firm that frequently serves as a defense expert in securities class actions prosecuted by the law firms that are defendants here. Lexecon had prepared several reports for Lincoln Savings and American Continental, and consequently became a target of the class' claims. In due course these claims were resolved. Thereafter Lexecon and its principal, Professor Daniel R. Fischel of the University of Chicago Law School, brought an action for, inter alia, malicious prosecution and defamation in federal district court for the Northern District of Illinois against several of the class attorneys—Milberg Weiss Bershad Hynes & Lerach and affiliated attorneys ("Milberg Weiss"), and Cotchett Illston & Pitre and affiliated attorneys ("Cotchett").[1] The underlying theory is that Milberg Weiss and

[1] The firm of Greenfield & Chimicles was also a defendant initially, but is not involved in these appeals.

Cotchett wrongfully dragged Lexecon into the Lincoln Savings litigation to satisfy a personal vendetta against Lexecon and Fischel. The Judicial Panel on Multidistrict Litigation ("JPML") transferred this case to District of Arizona and assigned it to Judge John M. Roll.

The resolution of Lexecon's claims in Judge Roll's court generally was unfavorable, as were its rulings on Milberg Weiss' counterattacks. These have resulted in four appeals to this court which have been consolidated.

In No. 95-16595, Lexecon appeals the adverse judgment on its malicious prosecution and abuse of process claims and the denial of its motion for leave to amend, as well as the denial of its motion to remand the case to Illinois. In No. 95-16403, Lexecon appeals from the final judgment in favor of the Cotchett defendants.

Milberg Weiss appeals, in No. 95-15759, the district court's denial of its efforts to obtain injunctive relief against Lexecon's prosecution of its claims, and, in No. 95-16754, the dismissal of its counterclaims against Lexecon.

We have jurisdiction under 28 U.S.C. § 1291, and we affirm the judgments of the district court.

I.

SOURCES OF THIS LITIGATION

Following the collapse of Lincoln Savings, investors residing in many districts of the federal judicial system brought actions charging violations of federal securities laws and RICO. In due course, these cases were transferred to the District of Arizona, consolidated into MDL 834 (sometimes designated as "*Shields*" or "*Lincoln Savings*") and assigned to Judge Richard Bilby.

As early as 1990, the consolidated plaintiff class, now represented by (among others) Milberg Weiss and Cotchett, sought to add Lexecon and Fischel as defendants by

filing a fifth amended complaint. Judge Bilby denied their motion to do so without prejudice. In February 1991, Judge Bilby granted the class' motion to file a sixth amended complaint, which added only Lexecon as a defendant, and alleged that:

> during 1987 and 1988 defendant Lexecon was engaged by ACC/Lincoln to perform services, including writing reports advocating the safeness of Lincoln's operations and the value of ACC/Lincoln's assets which were submitted to federal and state regulators in order to persuade them not to take regulatory action adverse to Lincoln.

Following a period of discovery, Lexecon's motion for summary judgment was denied. *See In re American Continental Corp./Lincoln S&L Sec. Litig.*, 794 F. Supp. 1424, 1448-49 (D. Ariz. 1992). Judge Bilby found there existed material issues as to whether Lexecon's reports were false and misleading, and whether Lexecon possessed reckless scienter as to Lincoln's fraudulent activities. In March 1992, the trial commenced. Almost four months later, and shortly before the close of evidence, Lexecon moved for a directed verdict. Judge Bilby denied the motion, again finding a jury question as to the level of Lexecon's knowledge of, and involvement in, Lincoln Savings' actions and practices.

On June 22, 1992, the class attorneys and Lexecon's counsel met in Judge Bilby's chambers to consider a means by which Lexecon's exposure to a jury verdict could be resolved without harmful consequences to its professional credibility and reputation. In furtherance of this end, Lexecon urged that any agreement that might be reached not be designated a "settlement." To accommodate Lexecon's concern, the term "resolution" was adopted. The terms of the resolution provided: First, that the court would enter an order dismissing Lexecon without prejudice; second, that the parties would sign a stipulation dismissing Lexecon with prejudice, which stipulation would be held

by Judge Bilby to be entered on the court's record only if a new suit was initiated against Lexecon on the same claims; and, third, that Lexecon would provide class services as a subcontractor to Touche Ross who, as another defendant in MDL 834, had settled its liability for $7.5 million. The resolution also placed restrictions on class counsel's ability to cross-examine Lexecon experts in future lawsuits about Lexecon's involvement in MDL 834.

This unusual arrangement was implemented, although because of disagreements between Lexecon and class counsel, Lexecon discharged its obligations by turning over to the class the approximately $700,000 it had received in professional fees from Lincoln Savings and American Continental, rather than performing the class services. This discharge was accomplished in October 1992.

Those who then thought that the concerns of Lexecon had been relieved were wrong. On November 25, 1992, Lexecon filed in the Northern District of Illinois (Lexecon's home state) the action now before us on appeal. The complaint set forth claims for malicious prosecution, abuse of process, tortious interference, defamation, and common law and statutory commercial disparagement. In June 1993, the JPML transferred the case to the District of Arizona for consolidation with MDL 834, and assigned it to Judge Roll because Judge Bilby had recused himself.

Judge Bilby's recusal obviously resulted in part from his reaction on learning of Lexecon's suit in Illinois. He arranged a telephonic hearing held on December 7, 1992, and therein charged Lexecon with what he viewed as its incorrect portrayal of the resolution of its role as a defendant in MDL 834. Following this hearing and the submission of letter briefs by the parties, Judge Bilby placed an order in the record of MDL 834 in which he found portions of Lexecon's Illinois complaint to be "a false description of the conditions under which Lexecon

was dismissed from this case."[2] The key portions of his order disputed Lexecon's characterization of its payment to the Lincoln Savings class as "voluntary," and of

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[2] The text of this order reads as follows:

> On August 12, 1992, Lexecon Inc. was dismissed from the above captioned matter. As this dismissal was without prejudice the Court retained jurisdiction and uses its powers now to clarify the terms and conditions of that dismissal. Moreover, pursuant to Fed. R. Civ. P. 60(a) the Court of its own initiative may correct any errors or omissions of the record. This Order in no way "rewrites" history, rather, it serves to clarify the terms and conditions of the Class Plaintiffs and Lexecon's agreement. This act of Court is required due to certain allegations made by Lexecon in *Lexecon Inc. v. Milberg Weiss Bershad Spechrie & Learch* [sic], Case No. 92 C 7768 (N.D. Ill. Nov. 25, 1992), a suit filed against Class Plaintiffs' counsel in the Northern District of Illinois.
>
> Specifically, in that Complaint Lexecon alleges:
>
> > 63. In June 1992, after all the evidence was in, but before closing arguments, Defendants finally agreed to dismiss Lexecon, implicitly acknowledging the lack of merit in their complaint.
> >
> > 64. At the same time, because it believed that its professional services had been misused by Lincoln and [Charles H.] Keating [Jr.], Lexecon voluntarily undertook to benefit the class by providing claims administration services (computerizing mailing lists, processing claims and the like). When Defendants' complaints to the court made it impossible for Lexecon to provide these services, Lexecon decided to benefit the class instead by voluntarily returning the professional fees paid to it by Lincoln and Keating...
> >
> > • • •
> >
> > 92. The *Shields* case was terminated in Lexecon's and Fischel's favor.
>
> *Lexecon Inc. v. Milberg Weiss Bershad Spechrie & Learch* [sic]. Complaint, ¶ 63, ¶ 64 and ¶ 92.
>
> The Court finds these paragraphs to be a false description of the conditions under which Lexecon was dismissed from this case. Although counsel for Lexecon at hearing argued that ¶ 93 [sic] is pled merely to satisfy one of the elements of

the resolution as a termination of the litigation in Lexecon's favor:

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malicious prosecution, it does not meet with reality and is factually incorrect.

The Class Plaintiffs/Lexecon resolution was a bargained-for exchange wherein consideration flowed both ways. Lexecon agreed to perform through Touche Ross certain administrative services to the Class Plaintiffs. Subsequently, Lexecon paid approximately $900,000 in cash instead of performing the services. (footnote omitted)

In return, Plaintiffs' counsel agreed to dismiss Lexecon from the case without prejudice and to not cross-examine the Lexecon experts about any "settlement" by Lexecon of the case. The fact that a case was filed and subsequently resolved without mention of the terms was always to be a proper subject of cross-examination. This aspect of the resolution was included because Lexecon and Mr. Fischel were concerned that if the term "settlement" was used, Lexecon experts would be open to in-depth cross-examination in courts across the country with consequent injury to its business. Hence, the term "settlement," and the connotations it might imply, was explicitly avoided and the term "resolution" used instead.

Counsel for Lexecon has furnished the Court with a portion of a transcript from the Eastern District of Tennessee, Northern District in a case captioned, *FDIC v. Ernst & Whitney*, CIV 3-87-364 (E.D. Tenn. Oct. 1, 1992) as evidence of Class Plaintiffs' Counsels' bad faith breach of the resolution. A copy of this transcript is attached as Exhibit "A".

It is the finding of this Court that Mr. Spencer cross-examined the Lexecon expert in accordance with the agreement reached with Lexecon in MDL 834 in every respect. Mr. Spencer never made any reference to the MDL 834 settlement before the jury in the Tennessee case, nor asked any questions in that case concerning a settlement in MDL 834. Indeed, Ms. Brickell on redirect, made the point that the FDIC had hired Lexecon *after* the Lincoln project. As long as Plaintiffs' counsels' future conduct is in accordance with Mr. Spencer's cross-examination in the Tennessee case, then the Lexecon resolution will not have been breached.

Moreover, under no circumstances was the Class Plaintiffs/Lexecon compromise a resolution in favor of *either* party or, more importantly, an adjudication on the merits. Instead, it was a bargained-for resolution of a disputed matter from which both parties benefited.

The Class Plaintiffs/Lexecon resolution was a bargained-for exchange wherein considerations flowed both ways.

. . .

Moreover, under no circumstances was the Class Plaintiffs/Lexecon compromise a resolution in favor of either party or, more importantly, an adjudication on the merits. Instead, it was a bargained-for-resolution of a disputed matter from which both parties benefited.

Lexecon's attempt to appeal this order to this court failed because there was as yet no final judgment in MDL 834. Lexecon took no appeal from the final judgment subsequently entered in March 1994.

Meanwhile, Judge Roll had begun his work on the case. In November 1993 he dismissed Lexecon's malicious prosecution and abuse of process claims. *In re American Continental Corp./Lincoln S&L Sec. Litig.*, 845 F. Supp. 1377, 1383-86 (D. Ariz. 1993). All the defendants in this case then answered, and Milberg Weiss filed counterclaims for breach of contract, fraud, unjust enrichment, and promissory estoppel. Discovery proceeded, followed by the defendants' motions for summary judgment.

In March 1994, before Judge Roll resolved the summary judgment motions, final judgment was entered in MDL 834. Lexecon thereupon moved under 28 U.S.C. § 1407 for a remand of its case to the Northern District of Illinois. Judge Roll instructed Lexecon to renew this motion after the close of discovery, which Lexecon did in November 1994. In response, Milberg Weiss moved to make the transfer to Arizona permanent under 28 U.S.C. §§ 1404(a) and 1406, and additionally moved for preliminary and permanent injunctions against the pursuit of this action, as well as all other claims made by Lexecon. Judge Roll denied the latter motion, and Milberg Weiss appealed. No. 95-15759.

Prior to ruling on the remand and transfer motions, Judge Roll granted summary judgment against Lexecon on its claims of tortious interference, commercial disparagement, and defamation based on the dissemination of Milberg Weiss' sixth amended complaint. *In re American Continental/Lincoln S&L Sec. Litig.*, 884 F. Supp. 1388 (D. Ariz. 1995). Lexecon's defamation claim based on a sentence in a letter written by a Milberg Weiss partner, Kevin P. Roddy, to, and which appeared in, *The National Law Journal*, survived. Judge Roll also dismissed Milberg Weiss' counterclaims. *Id.* at 1397. Because the Cotchett defendants, who were never Lexecon's principal target in this litigation, had no part in the Roddy letter, Judge Roll entered a final judgment in their favor pursuant to Fed. R. Civ. P. 54(b). Lexecon timely appealed that judgment. No. 95-16403.

Thereafter, Judge Roll entered an order denying Lexecon's motion to return the case to the JPML for remand to the Northern District of Illinois, and granting the Milberg Weiss motion to make the transfer to the District of Arizona permanent. Lexecon appealed the remand and transfer decision to this court by means of a petition for writ of mandamus, which was denied without prejudice as to Lexecon's raising the issue on direct appeal.

The climactic event in Judge Roll's court occurred on July 25-28, 1995, when Lexecon's defamation claim based on the Roddy letter to *The National Law Journal* was tried to a jury. The jury verdict favored Milberg Weiss. Lexecon appealed the subsequently entered final judgment, in particular the district court's transfer order and its dismissal of Lexecon's malicious prosecution and abuse of process claims. No. 95-16595. Milberg Weiss cross-appealed the dismissal of its counterclaims. No. 95-16754.

The order in which this court will address the issues before us on this appeal is as follows:

1. The permanent transfer of Lexecon's case from the Northern District of Illinois to the District of Arizona.
2. The denial of Milberg Weiss' motion for preliminary and permanent injunctions against the pursuit by Lexecon of its claims against Milberg Weiss and Cotchett.
3. The dismissal of Lexecon's malicious prosecution and abuse of process claims.
4. The dismissal of Milberg Weiss's counterclaims.

II.

THE PERMANENT TRANSFER TO THE DISTRICT OF ARIZONA
Nos. 95-16595 and 95-16403

The JPML transferred Lexecon's action to the District of Arizona pursuant to its authority under 28 U.S.C. § 1407(a), which states:

> When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section. . . . Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated[.]

The decision of the court below to transfer Lexecon's sole surviving claim to itself for trial, and its refusal to refer the case to the JPML for remand to Illinois, are vigorously challenged by Lexecon—and not for the first time.

Prior to the trial on the defamation claim, Lexecon brought before this court a petition for a writ of manda-

mus seeking: (1) to vacate the district court's order permanently transferring the remaining claim to the District of Arizona; and (2) to direct the district court to refer the case to the JPML for remand to the Northern District of Illinois. In an unpublished disposition, this court denied the petition and, while recognizing that Lexecon's arguments based on 28 U.S.C. §§ 1407 and 1404(a) might not lack merit, pointed out that they were contrary to existing case law and Multidistrict Litigation Rule 14(b). We explicitly recognized that the issue could be raised in an appeal on the merits. The dissent vigorously argued that 28 U.S.C. § 1407(a) authorizes the JPML to transfer a case for pretrial proceedings only, precluding a section 1404(a) transfer for a trial on the merits by the transferee court to itself, and that Multidistrict Litigation Rule 14(b) lacks a statutory basis. We now revisit these issues.

We review the district court's transfer under 28 U.S.C. § 1404(a) for an abuse of discretion. *Lou v. Belzberg*, 834 F.2d 730, 734 (9th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988). We review de novo the district court's interpretation of its duties under 28 U.S.C. § 1407. *Monrad v. FDIC*, 62 F.3d 1169, 1171 (9th Cir. 1995).

A. *Authority for the Section 1404(a) Transfer*

The power of a section 1407 transferee court to transfer a case to itself for trial has been recognized, explicitly or implicitly, by the courts that have considered the issue.[3] Patricia D. Howard, the Clerk of the JPML, has stated:

[3] *See, e.g., In re Food Lion, Inc., Fair Labor Standards Act Litig.*, 73 F.3d 528, 532 n.7 (4th Cir. 1996); *Washington Pub. Util. Group v. United States Dist. Ct.*, 843 F.2d 319, 326 (9th Cir. 1988); *In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1178 (D.C. Cir. 1987), *aff'd*, 490 U.S. 122 (1989); *Kohr v. Allegheny Airlines*, 504 F.2d 400, 402 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975); *Pfizer, Inc. v. Lord*, 447 F.2d 122, 124-25 (2d Cir. 1971); *Matter of Mahurkar Double Lumen Hemodialysis Catheter Patent Litig.*, 750 F. Supp. 330, 332 (N.D. Ill. 1990); *In re Air Crash Disaster*, 476 F. Supp. 445, 450 (J.P.M.L. 1979); *In re CBS Color Tube*, 342 F. Supp. 1403, 1404-05 (J.P.M.L. 1972).

> Although the Panel's power for the most part is limited to transfer for pretrial only, it is not uncommon for a transferee judge assigned by the Panel to transfer to his own or another district under 28 U.S.C. §§ 1404(a) or 1406 the actions which were previously assigned to him or her by the Panel under Section 1407.[4]

Permitting the transferee court to transfer a case to itself upon completion of its pretrial work often promotes efficiency in the disposition of the case or cases.[5] The time required for a new judge to become acquainted with the litigation is eliminated, as is the possibility of conflicting or duplicative rulings and proceedings. The above reasons strongly favored trial by the transferee court in this case, where pretrial proceedings left only one claim to be resolved by a trial that was scheduled to begin immediately and conclude in four days.

Moreover, the transferee court is empowered to dispose of the cases transferred to it by means of summary judgment or dismissal.[6] Therefore, logic supports its abil-

[4] Patricia D. Howard, "A Guide to Multidistrict Litigation," 124 F.R.D. 479, 479 (1989); *see also* Stanley A. Weigel, "The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts," 78 F.R.D. 575, 581 n.42 (1977); Moore's Federal Practice, *Manual for Complex Litigation* ¶ 31.13 at 251 n.785 (3d ed. 1995) ("Although transfer by the panel under § 1407 is only for pretrial purposes, the transferee court may find it appropriate to transfer cases to itself for trial under 28 U.S.C. § 1404 or § 1406.").

[5] Judge Kozinski, in his dissent, decries the fact that in multidistrict litigation cases concerns for judicial economy trump the usual deference to a plaintiff's choice of forum. We fail to see the problem here. Judicial economy is extremely important in multidistrict litigation: sufficiently important that Congress enacted a special statute, 28 U.S.C. § 1407, to ensure that in multidistrict cases the interest in judicial economy would not be overridden by deference to a plaintiff's choice of forum.

[6] *See, e.g., In re Food Lion, Inc.*, 73 F.3d at 532; *In re Korean Air Lines*, 829 F.2d at 1178; Weigel, "The Judicial Panel on Multidistrict Litigation," 78 F.R.D. at 582-83.

ity to dispose of the case, at least under the circumstances present here, by trial.

Despite longstanding practice and the efficiency arguments, Lexecon argues that 28 U.S.C. § 1407(a) requires remand for trial. The provision states in relevant part:

> Each action so transferred *shall be remanded by the panel* at or before the conclusion of such pretrial proceedings to the district from which it was transferred *unless it shall have been previously terminated* (emphasis added).

Equally specific is JPML R. 14(b), promulgated under the authority granted the JPML by 28 U.S.C. § 1407(f):

> Each transferred action that has not been terminated in the transferee district court shall be remanded by the Panel to the transferor district for trial, unless ordered transferred by the transferee judge to the transferee or other district under 28 U.S.C. § 1404 (a) or 28 U.S.C. § 1406.

This conflict between statute and rule, while apparent, is not real.[7] Congress in enacting section 1407 in 1968

[7] The dissent contends that Judge Roll contravened the text of 28 U.S.C. §§ 1404(a) and 1407(a) by denying Lexecon's motion to return the case to the JPML and granting Milberg Weiss' motion to transfer the case permanently to the District of Arizona. In making this argument, the dissent conveniently ignores the text of JPML Rule 14(b), which clearly interprets section 1404(a) to authorize the transferee judge to transfer the case to the transferee district. The dissent also conveniently ignores the text of 28 U.S.C. § 1407(f), which explicitly grants the JPML broad authority to "prescribe rules," such as Rule 14(b), as long as those rules are "not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure." 28 U.S.C. § 1407(f).

Implicit in the dissent's argument, then, is a claim that Rule 14(b) is inconsistent with sections 1404(a) and 1407(a). The dissent is far too quick to accuse the JPML of violating the statute that created it. It is useful to recall that the JPML consists of "seven circuit and district judges designated from time to time

was concerned with the emerging phenomenon of complex, multidistrict litigation. Its focus was upon creating and defining the functions of the JPML, not on redefining or circumscribing the traditional powers of the district court to which a case has been transferred. This is made reasonably clear by the House Report accompanying the proposed statute; that report stated that the bill "affects only the pretrial stages in multidistrict litigation. It would not affect the place of trial in any case or exclude the possibility of transfer under other Federal statutes." H. Rep. No. 1130, 90th Cong., 2d Sess. 3, *reprinted in* 1968 U.S.C.C.A.N. 1898, 1900. The report continued, *id.* at 1901-02:

> The subsection requires that transferred cases be remanded to the originating district at the close of coordinated pretrial proceedings. The bill does not therefore, include the trial of cases in the consolidated proceedings. The experience of the Coordinating Committee [for Multiple Litigation of the U.S. District Courts, established by the Judicial Conference of the United States] was limited to pretrial matters, and the committee consequently considers it desirable to keep this legislative proposal within the confines of that experience. . . . Of course, 28 U.S.C. 1404, providing for changes of venue generally, is available in those instances where transfer of a case for all purposes is desirable.

Thus, Congress, because of the nation's limited experience with multidistrict litigation, sought to design only the powers and duties of its new creation, the JPML.

by the Chief Justice of the United States." 28 U.S.C. § 1407(d). Respect for our brethren, and their longstanding practice, requires us to presume, absent compelling evidence to the contrary, that the rules promulgated pursuant to section 1407(f) are "not inconsistent with Acts of Congress." The alleged inconsistencies cited by the dissent are not sufficiently glaring to overcome that presumption. Hence, we conclude that Rule 14(b) is a valid exercise of the JPML's rulemaking authority, and that Judge Roll's actions in this case were fully justified.

Despite some uncertainty about this matter initially, the power of the transferee court to transfer a case to itself for trial has been reinforced by its consistent recognition in practice. Recourse to such sustained practice, particularly when approved by the JPML, is a legitimate aid to statutory interpretation. *See United States v. American Trucking Ass'n*, 310 U.S. 534, 549 (1940). In the case before us, this reading also strongly promotes judicial efficiency, which was a primary purpose of the legislation that created the JPML. *See* H. Rep. at 2, 1968 U.S.C.C.A.N. at 1899.

B. *The Procedures Available to Initiate Remand*

Additional insight into the apparently mandatory language of 28 U.S.C. § 1407(a) is provided by JPML Rule 14(c). That rule imposes the duty on the JPML to:

> consider remand of each transferred action . . . at or before the conclusion of coordinated or consolidated pretrial proceedings on (i) motion of any party, (ii) suggestion of the transferee district court, or (iii) the Panel's own initiative[.]

The absence of any such "motion" by a party, "suggestion" by the transferee court, or "initiative" of the Panel appears to leave the case in the care of the transferee court. Under these circumstances the transferee court must complete the litigation, even if it involves a trial, to avoid the absurdity of indefinitely suspended litigation, the pretrial proceedings of which have come to a close. Therefore, where the transferee court has declined to suggest a remand, the JPML has not ordered a remand on its own initiative, and the litigant has failed to seek a remand before the JPML, the transferee court is entitled to terminate the proceedings by conducting the trial. Besides setting out a procedure by which the JPML's duty to remand is triggered, this rule thus gives effect to the final clause of section 1407(a) by rendering its mandatory clause inoperative where the action has been terminated, even by trial.

That is the precise position in which the case rests in this appeal. The JPML's duty to remand was not activated. To repeat, the trigger to such activation was never pulled. Neither the district court nor the JPML sought to remand the case. Moreover, Lexecon, in lieu of moving the JPML for a remand, brought its motion before the district court, and now appeals to us for a remedy. Neither this procedure, nor its earlier petition for a writ of mandamus, amounts to a motion for remand brought before the JPML. Lexecon failed to seek succor from the one source that easily could have granted it if it so chose.[8] The district court, therefore, properly proceeded to conduct a trial on the single remaining, defamation claim, following the completion of the pretrial proceedings.

C. *Propriety of the Section 1404(a) Transfer*

Besides arguing that the district court's transfer to itself was without authority by virtue of section 1407, Lexecon also argues that it was improper under section 1404(a). Lexecon argues that any incremental gain in efficiency was at its expense, and that it was prejudiced by being dragged from Chicago, Illinois, to Arizona and forced to appear before Judge Roll, who was unfamiliar with MDL 834 and who improperly proceeded to "dismantle" its case. We disagree.

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[8] The dissent argues that Lexecon should not be faulted for its failure to move the JPML for remand, because Lexecon knew that the JPML would probably have denied the motion. Even assuming that Lexecon's prospects for success were slim, the fact remains that Rule 14(c) gave Lexecon the option to present its case to the JPML, including the arguments advanced by Judge Kozinski in his dissent. Lexecon chose not to pursue that option. In making this choice, Lexecon also knew, or should have known, that the option would expire, pursuant to Rule 14(b), if and when Judge Roll decided to transfer the case permanently to the District of Arizona.

Lexecon, to put it gently, was no stranger to the District of Arizona; its participation in MDL 834 precludes any such claim. Moreover, Judge Roll had become quite familiar with the case by the time of his decision to transfer the trial of the defamation claim to his own district. Finally, Judge Roll's dismissal of most of Lexecon's claims is not a ground for showing prejudice.

After a careful examination of the record and consideration of the arguments, we find no reason to question the district court's authority to try Lexecon's defamation claim in the District of Arizona, or the fairness of doing so.

III.

THE DENIAL OF INJUNCTIVE RELIEF SOUGHT BY MILBERG WEISS

No. 95-15759

After final judgment was entered in MDL 834 and Lexecon renewed its motion for a suggestion of remand, Milberg Weiss sought injunctive relief on the ground that the final judgment was res judicata as to Lexecon's claims. Milberg Weiss requested:

> (1) an order preliminarily enjoining plaintiffs . . . from prosecuting or otherwise pursuing against the Milberg Defendants, in any other judicial district or forum, any claims or other matters that were raised or could have been raised in the *Lincoln Savings* action . . .; and (2) an order permanently enjoining plaintiffs from prosecuting or otherwise pursuing those claims or other matters in any court or forum.

The district court concluded that Lexecon's claims were not precluded, and denied the motion.

We must uphold the denial of injunctive relief "unless the court incorrectly applied the law, relied on clearly erroneous factual findings, or otherwise abused its discretion." *Contract Serv. Network, Inc. v. Aubry*, 62 F.3d 294, 297 (9th Cir. 1995). We review de novo issues of

law underlying the denial, including the determination that Lexecon's claims were not barred by res judicata. *Id.* We now affirm.

A. *Mootness*

Initially, we confront the issue raised by Lexecon of the mootness of this appeal.[9] An appeal is moot "when events occur which prevent the appellate court from granting any effective relief even if the dispute is decided in favor of the appellant." *Holloway v. United States*, 789 F.2d 1372, 1373 (9th Cir. 1986) (internal quotation omitted). To the extent that Milberg Weiss sought to have the district court enjoin the litigation before the district court, which thereafter was completed favorably to Milberg Weiss by the entry of final judgment, its appeal from the court's failure to do so is moot. However, mootness does not extend to the efforts of Milberg Weiss to enjoin Lexecon from prosecuting its claims in other courts.

B. *Res Judicata*

Milberg Weiss supports its effort to enjoin Lexecon by arguing that the MDL 834 litigation foreclosed Lexecon's claims by reason of res judicata. This considerably overstates the preclusive effect of Judge Bilby's actions.

Under the doctrine of res judicata, "[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). Judge Bilby's action pertaining to Lexecon was to dismiss the claims of the class against Lexecon without prejudice, in accordance with the parties' resolution. We have held that a dismissal

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[9] Lexecon also argues that the denial was not an appealable interlocutory order under 28 U.S.C. § 1292(a)(1). This is irrelevant given that final judgment has since been entered. *See In re Jenson*, 980 F.2d 1254, 1258 (9th Cir. 1992) (upon entry of final judgment, interlocutory orders become appealable). We decline to discuss Lexecon's several additional arguments concerning procedural irregularities in Milberg Weiss' appeal, which are without merit.

without prejudice lacks res judicata effect. *In re Corey*, 892 F.2d 829, 835 (9th Cir. 1989), *cert. denied*, 498 U.S. 815 (1990). Nor was Judge Bilby's subsequent order of December 31, 1992 (*see supra* n.2), a judgment on the merits of the claims against Lexecon. That order merely clarified the terms of the resolution, indeed emphasized that there had been no judgment on the merits of the claims against Lexecon.

Lexecon's reliance on *Western Sys., Inc. v. Ulloa*, 958 F.2d 864 (9th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993), and *Golden v. Pacific Maritime Ass'n*, 786 F.2d 1425 (9th Cir. 1986), is therefore misplaced. Those cases develop the relitigation exception to the Anti-Injunction Act, which allows a district court to enjoin litigation in other courts if such litigation is barred by res judicata.[10] Because Lexecon's claims are not barred by res judicata, those cases are not controlling.

C. *The Requirements for Injunctive Relief*

Even if Lexecon's claims were barred by res judicata, Milberg Weiss has still failed to show that the district court abused its discretion in declining to grant injunctive relief. To obtain a preliminary injunction, a party must show either "(1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) the existence of serious questions going to the merits and the balance of hardships tipping in the movant's favor." *MAI Sys. Corp. v. Peak Computers, Inc.*, 991 F.2d 511, 516 (9th Cir. 1993) (internal quotation omitted), *cert. dismissed*, 114 S. Ct. 671 (1994). At the time the Milberg Weiss' motion was filed, no such showing could be made. At that time, February 6, 1995, Milberg Weiss had also moved for a

[10] *See* 28 U.S.C. § 2283 ("A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."); *Western Sys.*, 958 F.2d at 871; *Golden*, 786 F.2d at 1427.

permanent transfer of this case to the Arizona District, and Judge Roll was poised to rule on Lexecon's motion to refer the case to the JPML for remand. His rulings thereafter were generally favorable to Milberg Weiss. Even had these rulings been adverse to Milberg Weiss, it could have appealed them to this court; therefore, it could not show either the possibility of irreparable injury or that the balance of hardships tipped in its favor. *See United States v. Rohm & Haas Co.*, 721 F. Supp. 666, 699 (D.N.J. 1989) (refusing to enjoin itself from entering proposed consent decree where appealability of the decree defeated any claim of irreparable harm). Nor was there any indication that Lexecon was likely to initiate an entirely new lawsuit on the same claims in a different forum. In short, Milberg Weiss failed to establish the conditions prerequisite to the issuance of the preliminary and permanent injunctions it sought.[11]

IV.

THE DISMISSAL OF THE MALICIOUS PROSECUTION AND ABUSE OF PROCESS CLAIMS
Nos. 95-16595 and 95-16403

We now turn to Lexecon's appeal from the dismissal by the district court under Fed. R. Civ. P. 12(b)(6) of its malicious prosecution and abuse of process claims. Our review of this dismissal is de novo, with all factual allegations taken as true and construed in the light most favorable to Lexecon. *See Gotcher v. Wood*, 66 F.3d 1097, 1099 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3605 (U.S. Feb. 26, 1996) (No. 95-1385). The district court's denial of Lexecon's motion for leave to amend its complaint is reviewed for an abuse of discretion. *United*

[11] Lexecon requests attorneys' fees for a frivolous appeal under Fed. R. App. P. 38. However, Rule 38, as amended effective December 1, 1994, requires that any such request be made by a separately filed motion. Without commenting on the merits of its request, we therefore deny Lexecon's request without prejudice to its filing a separate motion for attorneys' fees.

States v. County of San Diego, 53 F.3d 965, 969 n.6 (9th Cir.), *cert. denied*, 116 S. Ct. 183 (1995).

A. *Malicious Prosecution*

Under Arizona law, which the parties no longer dispute is the applicable law, the plaintiff must allege, and to prevail must ultimately prove, that the defendant "(1) instituted a civil action which was (2) motivated by malice, (3) begun without probable cause, (4) terminated in plaintiff's favor and (5) damaged plaintiff." *Bradshaw v. State Farm Mut. Auto Ins. Co.*, 758 P.2d 1313, 1319 (Ariz. 1988). Under Arizona law, probable cause requires that the plaintiff honestly believe in the lawsuit's possible merits and that the belief be objectively reasonable. *Id.* (citing Restatement (2d) of Torts § 675 comment c; Prosser & Keeton on the Law of Torts § 120, at 893 (5th ed. 1984).

There is no dispute here that Lexecon has properly alleged the first and last elements of the cause of action. Assuming, for purposes of argument only, that Lexecon has sufficiently alleged lack of probable cause and malice as well its claim fails nonethless. Judge Bilby's ruling in MDL 834 including his order of December 31, 1992 (*see supra* n.2) plainly indicated that the litigation was not "terminated" in Lexecon's favor.

Lexecon attempts to avoid this roadblock to its malicious prosecution claim by insisting that the district court erred in examining the MDL 834 record in ruling on Milberg Weiss' 12(b)(6) motion.[12] In general, material outside the pleadings cannot be considered in ruling on a motion to dismiss, unless the motion is treated as one for summary judgment and the parties are "given reasonable opportunity to present all material made pertinent to such

[12] *See, e.g., In re American Continental*, 845 F. Supp. at 1385 ("The record before this Court as recited in the *Shields* rulings is highly persuasive evidence that the case against Lexecon meets the probable cause threshold.").

a motion by Rule 56." Fed. R. Civ. P. 12(b); *Jacobsen v. AEG Capital Corp.*, 50 F.3d 1493, 1496 (9th Cir. 1995). Nonetheless, ample authority exists which recognizes that matters of public record, including court records in related or underlying cases which have a direct relation to the matters at issue, may be looked to when ruling on a 12(b)(6) motion to dismiss. *See Shaw v. Hahn*, 56 F.3d 1128, 1129 n.1 (9th Cir.), *cert. denied*, 116 S. Ct. 418 (1995); *Henson v. CSC Credit Serv.*, 29 F.3d 280, 284 (7th Cir. 1994); *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992).

It would be absurdly formal to hold that Judge Bilby's published opinion in MDL 834 and his December 31, 1992, order must be ignored in ruling on a motion to dismiss Lexecon's malicious prosecution claim. Only by alleging its own involvement as a defendant in MDL 834 was Lexecon able to frame its claim of malicious prosecution; why should the district court be limited by Lexecon's selective telling of a story that unfolded, and was duly recorded, in its sister court? Milberg Weiss, in its motion to dismiss, was entitled to refer to the record and outcome of the MDL litigation, and the district court was entitled to do the same in assessing the viability of Lexecon's claim. Formalism has its place, but that place is not here.

Lexecon argues further that the record in MDL 834 supports its contention that the litigation terminated in its favor. This is not true. "A termination does not satisfy the [favorable termination] element [of a malicious prosecution claim] if it is the result of compromise or settlement of the claim." *Frey v. Stoneman*, 722 P.2d 274, 277 (Ariz. 1986) (en banc). "If entry of summary judgment was merely the formal means of securing the parties' settlement benefits, the judgment cannot form the basis for a malicious prosecution action." *Id.* at 278-79 (internal quotation omitted). Here, the avoidance of the use of the term

"settlement" in favor of the alternative "resolution" does not alter that result.

Lexecon urges us to rely on *Bradshaw*, 758 P.2d at 1321, which held that a settlement may be a favorable termination depending on the surrounding facts. Lexecon argues that favorable termination is a question of fact that cannot be resolved on a 12(b)(6) motion. We disagree. In *Bradshaw*, the settlement terms called for the plaintiff to withdraw its action, pay the defendants $60,000, and stipulate to a dismissal with prejudice. Here, it was the defendant Lexecon that paid $700,000 in exchange for its dismissal from MDL 834. No additional factual development is necessary. The circumstances of this case do not indicate that the MDL 834 litigation against Lexecon terminated in its favor. It follows that Lexecon's malicious prosecution claim against both Milberg Weiss and Cotchett fails.

It also follows that we need not consider the argument of Milberg Weiss that the tort of malicious prosecution has been reshaped by First Amendment principles developed in the *Noerr-Pennington doctrine* [13] and *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 113 S. Ct. 1920, 1925 (1993) ("*PREI*"). Milberg Weiss argues that these decisions have raised the threshold for access to a malicious prosecution claim by requiring the plaintiff to show that the defendant's earlier suit was "objectively baseless" and one in which "no reasonable litigant could realistically expect success on the merits." [14] This formulation, if applied, would alter the

[13] *See California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

[14] The district court did dismiss the malicious prosecution claim on this ground, concluding that Lexecon could not show that the class' claims against it in MDL 834 were objectively baseless as required by *PREI*. However, we may affirm the dismissal on any basis supported by the record. *Pentax Corp. v. Myhra*, 72 F.3d 708, 710 (9th Cir. 1995).

meaning under Arizona law of the "probable cause" element, and to some degree the "malice" element, by eliminating the subjective, honest belief requirement.

Noerr-Pennington and *PREI* were federal antitrust cases that did not address the state law tort of malicious prosecution. In this circuit, the application of this line of cases to state law claims has been unpredictable. For example, the *PREI* objective baselessness standard was not applied to a National Labor Relations Board decision that a libel suit brought by an employer against a union was an unfair labor practice. *PREI* was said not to be on point. *Diamond Walnut Growers, Inc. v. NLRB*, 53 F.3d 1085, 1087-88 (9th Cir. 1995). On the other hand, a timber company counterclaim against an environmental organization for abuse of process, based on that organization's efforts to enjoin logging on the timber company's land, was required to meet the heightened pleading standard associated with *Noerr-Pennington*. *Oregon Natural Resources Council v. Mohla*, 944 F.2d 531, 533-35 (9th Cir. 1991).

The rationalizing principle of these cases is unclear, unless it rests on a judicial preference for certain types of litigation that appear to promote specifically recognized public interests. To encourage vigilent pursuit of these interests, it may be thought proper to protect them against threats of malicious prosecution by raising the barrier to access to that remedial tort action. Milberg Weiss argues, in substance if not in form, that the class action on behalf of Lincoln Savings investors easily conforms to that rationalization. Innocent investors in improperly operated savings and loan institutions and their legal representatives are as deserving of protection from the threat of malicious prosecution by those who have rendered financial services to such institutions as are plaintiffs in antitrust or environmental proceedings.

While there is a certain appeal in such an approach, we decline to rest our rejection of Lexecon's malicious prose-

cution on this ground.[16] We hold only that the MDL 834 litigation against Lexecon was not terminated in its favor. Therefore, under Arizona law, Lexecon has failed to state a claim of malicious prosecution.

B. *Abuse of Process*

Abuse of process is described by the Restatement (Second) of Torts § 682 (1977) as follows:

> One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process.

This definition is accepted by the Arizona courts. *See Nienstedt v. Wetzel*, 651 P.2d 876, 881 (Ariz. App. 1982); *Morn v. City of Phoenix*, 730 P.2d 873, 875 (Ariz. App. 1986). Plaintiff must show that defendants (1) committed a willful act in the use of judicial process

[16] There is now extensive case law on both sides of the question whether the *Noerr-Pennington* doctrine brings first amendment principles to bear on state law tort claims. *See, e.g., State of South Dakota v. Kansas City Southern Indus.*, 880 F.2d 40, 50-51 (8th Cir. 1989) (applying first amendment analysis to a state claim for tortious interference with contractual relations), *cert. denied*, 498 U.S. 1023 (1990); *Brownsville Golden Age Nursing Home, Inc. v. Wells*, 839 F.2d 155, 159-60 (3d Cir. 1988) (applying defamation and *Noerr-Pennington* analyses to tort claim based on defendants' actions in alerting authorities to plaintiff's violations of law); *Havoco of Am., Ltd. v. Hollobow*, 702 F.2d 643, 649 (7th Cir. 1983) (applying *Noerr-Pennington* and its sham litigation exception "to protect the First Amendment right to petition against claims of tortious interference with business relationships"); *Sierra Club v. Butz*, 349 F. Supp. 934, 938-39 (N.D. Cal. 1972) (applying first amendment analyses of *Noerr-Pennington* and defamation cases to state counterclaim for interference with advantageous relationship); *Florida Fern Growers, Inc. v. Concerned Citizens of Putnam County*, 616 So.2d 562, 569 (Fla. 1993) (declining to follow *Sierra Club v. Butz*). The time may come when this circuit must speak definitively on the question. However, this is not the right time, or the right case in which, to do so.

(2) for an improper ulterior purpose. *Nienstedt*, 651 P.2d at 881.

The gravamen of the tort is not "the wrongful procurement of legal process or the wrongful initiation of criminal or civil proceedings; it is the misuse of process, no matter how properly obtained, for any purpose other than that which it was designed to accomplish." Restatement § 682, comment a; *see also Morn*, 730 P.2d at 875.

Accordingly, the task of this court is to determine whether the addition of Lexecon as a defendant in the MDL 834 litigation had as its primary purpose an objective for which that litigation was not intended. We hold that no such objective existed in MDL 834.

It is clear that the primary purpose of the MDL 834 litigation was to recover from the collapse of American Continental/Lincoln Savings on behalf of the investors therein such assets as was possible under the law. Lexecon, of course, does not deny that. Rather, its focus is upon its inclusion as a defendant. It asserts that class counsel's primary purpose in attempting to add Lexecon and Fischel as defendants was "(1) to extract false testimony implicating other *Shields* defendants, (2) prevent Arthur Young & Co. from using Lexecon as an expert in *Shields*, and (3) 'to make Lexecon . . . far less attractive to potential clients as expert witnesses.'" *In re American Continental*, 845 F. Supp. at 1382.

Lexecon alleges that after Milberg Weiss sought to file a fifth amended complaint adding both Lexecon and Fischel as defendants, it offered to dismiss the motion in exchange for "false testimony" against existing defendants. Lexecon refused, and leave to file this fifth amended complaint was subsequently denied. The alleged attempt to extract false testimony therefore never amounted to anything. Although process did later issue against Lexecon only as a result of defendants' successful motion to file their sixth amended complaint, the attempt to coerce false testimony was not repeated. Therefore, Lexecon

cannot show that the primary purpose behind Milberg Weiss' use of process was to coerce false testimony.

Lexecon also points to additional acts of Milberg Weiss that it claims amounted to an abuse of process. Some of these acts, such as the unsuccessful motion to file the fifth amended complaint, occurred "pre-process," and were therefore not actionable.[16] Others were collateral to the MDL 834 litigation, such as Milberg Weiss attorneys' use of that litigation to impeach Lexecon expert witnesses during cross-examination in separate and distinct litigation. Such cross-examination, so long as it conformed to the terms of the MDL 834 resolution, was not improper and therefore cannot form the basis of an abuse of process claim.

The acts alleged by Lexecon did not have as their *primary purpose* to inflict harm on Lexecon or Fischel. Nor did the addition of Lexecon as an MDL 834 defendant to assert that Lexecon bore some responsibility for those investors' losses constitute an abuse of process. Lexecon's abuse of process claim was therefore properly dismissed.[17]

V.

THE DISMISSAL OF MILBERG WEISS' COUNTERCLAIMS
No. 95-16754

The Milberg Weiss counterclaims alleged fraud, breach of contract, unjust enrichment, and promissory estoppel.

[16] Although Arizona courts define "process" broadly, *Nienstedt*, 651 P.2d at 880, we agree with the district court that it is not read so broadly as to include a failed attempt to sue in which process never issued.

[17] Examination of Lexecon's proposed second amended complaint shows that it merely reiterates the same claims in new language. Because leave to amend is inappropriate where the amendment dos not solve the legal deficiencies in the complaint, the district court did not abuse its discretion in denying Lexecon's motion for leave to amend. *See Jackson*, 902 F.3d at 1887.

The alleged source of these claims is the negotiations that led to the resolution of Lexecon's exposure to liability in MDL 834. We review their dismissal de novo. *Gotcher*, 66 F.3d at 1099; *Barrus v. Sylvania*, 55 F.3d 468, 469 (9th Cir. 1995).

First, Milberg Weiss alleged that while Lexecon said it was negotiating the "resolution" to avoid damaging cross-examination about MDL 834 in future cases, its true reason was to preserve its ability to sue class counsel for malicious prosecution by avoiding an unfavorable jury verdict. The district court properly dismissed this claim. While Milberg Weiss is a party in the litigation now before this court, it was not a party in the MDL 834 litigation; rather, it was a counsel to the class on whose behalf the proceedings against Lexecon were brought. As the district court put it: "Whatever harm resulting from the resolution was sustained by the class, not by class counsel." *In re American Continental*, 884 F. Supp. at 1397.

Second, Milberg Weiss argues that during the negotiations, Lexecon represented that it had no applicable insurance when in fact it did have such insurance, and that it relied on that representation in agreeing to the resolution. The district court properly ignored this claim because Milberg Weiss failed either to raise the issue in its pleadings, or to request leave to amend. *See* Fed. R. Civ. P. 15(a).

VI.

CONCLUSION

The judgments in Nos. 95-15759, 95-16403, 95-16595, and 95-16754 are affirmed.

KOZINSKI, Circuit Judge, dissenting.

Since the Judicial Panel on Multidistrict Litigation (JPML) was created in 1968, it has transferred 92,562 cases for consolidated pretrial proceedings. Only 3,508 of these—less than four percent—have been sent back for trial in the district where the complaint was filed. Administrative Office of the United States Courts, *Judicial Business of the United States Courts: 1995 Report of the Director* 32. Yet the statute which authorizes the JPML to transfer cases for coordinated or consolidated pretrial proceedings commands that "[e]ach action so transferred shall be remanded by the [JPML] at or before the conclusion of such pretrial proceedings to the district from which it was transferred . . . ." 28 U.S.C. § 1407(a). These numbers tell the story of a remarkable power grab by federal judges who have parlayed a narrow grant of authority to conduct consolidated discovery into a mechanism for systematically denying plaintiffs the right to trial in their forum of choice.

You don't have to stare very long at the statutory language and drafting history to realize this is not at all what Congress had in mind when it passed 28 U.S.C. § 1407. The language itself is clear as sunlight: A case may be transferred in order to take advantage of consolidated or coordinated discovery with other cases having a common factual nucleus. Coordinated or consolidated pretrial proceedings are to be handled by the transferee court but, if the case is to be tried, it must go back from whence it came.

The legislative history—if such limpid prose needs elucidation—is perfectly consistent with the text. Congress made a deliberate choice to authorize transfer for pretrial purposes only. "[T]he bill provides for the transfer of venue of an action for the limited purpose of conducting coordinated pretrial proceedings." H. Rep. No. 1130, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. 1898, 1900. Congress thought about authorizing the JPML to transfer cases for all purposes but decided not to: "The bill does not, therefore, include the trial of cases in consolidated proceedings" *Id.* at 1901. Congress promised to return to the issue if it found the current grant of authority insufficient: "If . . . future experience justifies extending [section 1407] to include consolidation and coordination for trial purposes as well, only minor amendments to the present language of the bill will be necessary." *Id.* at 1902. Congress has never made those amendments.

Soon after the MDL process got underway, a peculiar thing started happening: Judges began to develop proprietary feelings toward the cases entrusted to them; they began using 28 U.S.C. § 1404(a), the venue transfer statute, to hold on to these cases for trial. Some judges worried that such transfers were not authorized: "I must recognize candidly," wrote Judge Bownes, then of the District of New Hampshire, "that there is nothing in the language of 28 U.S.C. § 1407(a) or 1404(a) which directly allows, or even suggests, that the transferee judge has the power to transfer cases to his district, or any district, for purposes of trial." *In re Air Crash Disaster Near Hanover, New Hampshire*, 342 F. Supp. 907, 909 (D.N.H. 1971). Such scruples were cast aside after the Second Circuit's opinion in *Pfizer, Inc.* v. *Lord*, 447 F.2d 122, 124-25 (2d Cir. 1971), a case that proved unusually influential, perhaps because retired Associate Justice Tom Clark was a member of the two-judge panel that authored the opinion.

Since *Pfizer*, this practice (known as "self-transfer") has become a routine aspect of the MDL process. The JPML has blessed self-transfer by its Rule 14(b), which provides that the Panel will not send a case back for trial if the district court handling pretrial matters transfers the case to itself, and by caselaw holding that the JPML will not even consider remanding so long as the district court is considering a self-transfer motion. *See in re CBS Color Tube Patent Litig.*, 342 F. Supp. 1403, 1405 (J.P.M.L.

1972) ("In view of the pendency of [a § 1404(a)] motion, we expressly refrain from granting this motion for remand and interfering in matters within the discretion of the transferee judge.").[1]

The majority thus has ample company in holding that a district judge to whom a case has been sent for pretrial under section 1407(a) may latch onto it by ordering a section 1404(a) self-transfer. *See* maj. op. at 15787. Every court that has examined the issue since *Pfizer* has held or assumed that such authority exists.[2] But a close

[1] It is for this reason that the majority's suggestion that Lexecon somehow waived its right to seek return of the case to the Northern District of Illinois is ill founded. *See* maj. op. at 15790-91. Under the Panel's rules and precedent, the JPML will not normally consider a transfer without a recommendation from the district judge. *See, e.g.*, J.P.M.L. R. Proc. 14(d) ("The Panel is reluctant to order remand absent a suggestion of remand from the transferee district court."); *In re A.H. Robins Co.*, 453 F. Supp. 108, 110 (J.P.M.L. 1978); *In re Holiday Magic Securities & Antitrust Litig.*, 433 F. Supp. 1125, 1126 (J.P.M.L. 1977) (both noting that, absent a suggestion from the transferee court, a party seeking remand from the JPML bears a heavy burden of persuasion). Lexecon—in compliance with this authority—petitioned the district court in August 1994 to refer the case back to the JPML because all possible coordinated discovery had concluded. The district court stayed consideration of this motion pending the end of discovery, Lexecon renewed its remand request at the close of discovery in November 1994. In December 1994, defendants moved for a section 1404(a) transfer, and in March 1995, the district court granted the transfer to itself, while simultaneously denying Lexecon's remand request.

Lexecon surely cannot be faulted for following the JPML rules by petitioning the district court twice for a referral and awaiting its ruling. And, by the time the court denied the motion, it had transferred the case to itself, which made the case off limits for further action by the Panel. *See* J.P.M.L. R. Proc. 14(b). The majority's charge that Lexecon—which went so far to seek a writ of mandamus from our court—"failed to seek succor" for its wrongs, maj. op. at 15792, is a sucker-punch.

[2] *See* maj. op. at 15787 & n.3 (citing *In re Food Lion, Inc., Fair Labor Standards Act Litig.*, 73 F.3d 528, 532 n.7 (4th Cir. 1996);

look at this caselaw reveals a remarkable lack of critical attention to this issue, with almost every court relying on *Pfizer* as the sum and substance of its analysis.[3] In fact, *Pfizer*, with its one page of analysis, is the only court

Washington Pub. Util. Group v. United States Dist. Ct., 843 F.2d 319, 326 (9th Cir. 1987); *In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1178 (D.C. Cir. 1987); *aff'd*, 490 U.S. 122 (1989); *Kohr v. Allegheny Airlines*, 504 F.2d 400, 402 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975); *In re Mahurkar Double Lumen Patent Litig.*, 750 F. Supp. 330, 332 (N.D. Ill. 1990); *In re Air Crash Disaster near Chicago*, 476 F. Supp. 445, 450 (J.P.M.L. 1979); *In re CBS Color Tube*, 342 F. Supp. at 1404-05).

[3] *See, e.g., Washington Pub. Util. Group*, 843 F.2d at 326; *In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d at 1178 n.7; *In re Fine Paper Antitrust Litigation*, 685 F.2d at 820 n.7; *Eastern Air Lines, Inc. (in re Air Crash Disaster at Florida Everglades on Dec. 29, 1972)*, 549 F.2d at 1009 n.4; *In re Air Crash Disaster at Detroit Met. Airport on Aug. 16, 1987*, 737 F. Supp. 391, 394 n.4 (E.D. Mich. 1989); *In re Tax Refund Litig.*, 723 F. Supp. 922, 924 (E.D.N.Y. 1989); *In re Air Crash Disaster at Stapleton Int'l Airport, Denver, Colo., on Nov. 15, 1987*, 720 F. Supp. 1455, 1458 (D. Colo. 1988); *In re Dow Co. "Sarabond Products" Liab. Litig.*, 664 F. Supp. 1403, 1403-04 (D. Colo. 1987); *In re Air Crash Disaster at John F. Kennedy Int'l Airport on June 24, 1975*, 479 F. Supp. 1118, 1122-23 (E.D.N.Y. 1978); *In re Air Crash Disaster Near Chicago*, 476 F. Supp. at 450; *In re Anthracite Coal Antitrust Litig.*, 436 F. Supp. 402, 403-04 (J.P.M.L. 1977); *In re Bristol Bay, Alaska, Salmon Fishery Antitrust Litig.*, 424 F. Supp. 504, 507 (J.P.M.L. 1976); *In re Bomb Disaster at Roseville, Cal., on April 28, 1973*, 399 F. Supp. 1400, 1403 (J.P.M.L. 1975); *In re Caesars Palace Securities Litig.*, 360 F. Supp. 366, 374 (S.D.N.Y. 1973); *In re Aircrash Near Duarte, Cal., on June 6, 1971*, 357 F. Supp. 1013, 1015 (C.D. Cal. 1973); *In re CBS Color Tube Patent Litig.*, 342 F. Supp. at 1405 n.2; *In re Air Crash Disaster at Huntington, W. Va., on Nov. 14, 1970*, 342 F. Supp. 1400, 1403 n.4 (J.P.M.L. 1972); *Greyhound Computer Corp. v. I.B.M. Corp.*, 342 F. Supp. 1143, 1145 (D. Minn. 1972); *In re Viatron Computer Systems Corp. Litig.*, 86 F.R.D. 431, 432-33 (D. Mass. 1980); *In re Master Key Antitrust Litig.*, 70 F.R.D. 23, 28 (D. Conn. 1975); *In re Penn Central Commercial Paper Litig.*, 62 F.R.D. 341, 345 (S.D.N.Y. 1974), *aff'd*, 515 F.2d 502 (2d Cir. 1975) (all relying on *Pfizer*).

of appeals opinion that seriously addresses the issue; most merely *refer* to the practice on the way to tackling other questions.[4] A lot of cases thus seem to sanction the practice, but not a single case after *Pfizer* has taken an independent look at the issue or dealt with the difficult questions it raises.

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[4] *In re Korean Air Lines Disaster of Sept. 1, 1893* dealt with whether the *Van Dusen* rule—that the state law applicable in the transferor forum attends the transfer—should apply to transferred federal claims. *See* 829 F.2d at 1174. Although Judge Douglas Ginsburg in his concurrence does mention the self-transfer practice, *see id.* at 1178 (D.H. Ginsburg, J., concurring), Judge Ruth Bader Ginsburg writing for the court describes section 1407(a) as "a statute authorizing transfers only for pretrial purposes." *Id.* at 1174. The Fourth Circuit also made passing reference to this practice in a footnote, *see In re Food Lion, Inc., Fair Labor Standards Act Litig.*, 73 F.3d at 532 n.7, on its way to addressing the issue in that case—when parties may appeal dispositions in the transferee court. Significantly, the Fourth Circuit noted, "Although Congress has not yet seen fit to allow the Panel or the transferee court to consolidate cases for trial, this is possibly a next step." *Id.* at 532. Our circuit and the Fifth have also noted the practice, but declined to address its legitimacy because the parties hadn't raised the issue. *See Washington Pub. Util. Group* v. *United States Dist. Ct.*, 843 F.2d 319 at 326 (the parties "disagree only as to whether the court properly applied [section 1404(a)]"; *Gordon* v. *Eastern Air Lines, Inc. (In re Air Crash Disaster at Florida Everglades on Dec. 29, 1972)*, 549 F.2d at 1009 n.4 ("The parties have not raised the question whether [a court can transfer an MDL case to itself;] therefore we do not reach it."). The Seventh Circuit has twice reported that the practice exists when recapping the factual history of cases that dealt with issues unrelated to the self-transfer question. *See Eckstein* v. *Balcor Film Investors*, 8 F.3d 1121 (7th Cir. 1993), *cert. denied*, 510 U.S. 1073 (1994); *Kohr*, 504 F.2d at 402.

Only the Third Circuit has seemingly blessed this practice. *See In re Fine Paper Antitrust Litigation*, 685 F.2d at 810. But the Third Circuit, in the single paragraph it devotes to the subject, doesn't even mention the possible conflict with section 1407(a), effectively assuming that self-transfer in the MDL context is appropriate. *See id.* at 819-20. Moreover, the Third Circuit's analysis consists primarily of a block quote from, you guessed it, *Pfizer*. *See id.* at 820 n.7.

While the federal courts have treated *Pfizer* as dispositive, commentators have been far more skeptical. With remarkable unanimity, they have questioned whether, and under what circumstances, district judges to whom cases are entrusted for purposes of discovery may hold on to them for trial. *See, e.g.*, 15 Charles A. Wright, et al., *Federal Practice and Procedure* § 3866, at 619 (2d ed. 1986) ("More questionable is the practice of the Section 1407 judge transferring the cases to himself for all purposes under Section 1404(a) of Title 28 . . . thereby giving the transferee court the ability to conduct the trial."); Robert H. Transgrud, *Joinder Alternatives in Mass Tort Litigation*, 70 Cornell L. Rev. 779, 809 (1985) ("[It] seems clear that the lower federal courts have done by judicial fiat what Congress refused to do by statute in 1969: amend section 1407 to allow transfers for trial."); Ross D. Cooper, *The Korean Air Disaster: Choice of Law in Federal Multidistrict Litigation*, 57 Geo. Wash. L. Rev. 1145, 1164 (1989) (similar); Mike Roberts, *Multidistrict Litigation and the Judicial Panel, Transfer and Tag-Along Orders Prior to a Determination of Remand: Procedural and Substantive Problem or Effective Judicial Public Policy?*, 23 Mem. St. U. L. Rev. 841, 866 (1993) ("It is a leap in logic to conclude that causes of action not terminated upon dispositive motions should be retained in the transferee court under the rubric of § 1404(a), when the statutory language of § 1407 explicitly directs remand to the transferor court."); *Report of the American Bar Association Section of Antitrust Law Task Force to Review the Supreme Court's Decision in* California v. ARC American Corp., 59 Antitrust L.J. 273, 302 (1990) ("[T]he use of Section 1404(a) transfers to consolidate multidistrict cases for trial is of dubious legal validity."); Blake M. Rhodes, Comment, *The Judicial Panel on Multidistrict Litigation: Time for Rethinking*, 140 U. Penn. L. Rev. 711, 734 (1991) ("[A] transferee court's use of § 1404(a) sets Congress's carefully crafted plan for multidistrict litigation on its head.");

Stanley J. Levy, *Complex Multidistrict Litigation and the Federal Courts*, 40 Fordham L. Rev. 41, 64 (1971) (the language and legislative history of section 1407(a) are so clear that it "originally appeared to be a futile exercise for a 1407 transferee court to rule on a 1404 transfer motion."); John F. Cooney, Comment, *The Experience of Transferee Courts Under the Multidistrict Litigation Act*, 39 U. Chi. L. Rev. 588, 606 (1972) ("[T]he apparently mandatory nature of the remand clause . . . implies that transferee courts lack this jurisdiction [to grant a section 1404 motion]."); George T. Conway III, Note, *The Consolidation of Multistate Litigation in State Courts*, 96 Yale L.J. 1099, 1102-03 (1987) ("[C]onsolidation for trial almost certainly defies both the letter of section 1407 and the intent of its drafters." (footnotes omitted)); Note, *The Judicial Panel and the Conduct of Multidistrict Litigation*, 87 Harv. L. Rev. 1001, 1030-31 (1974) (legislative history of section 1407 emphasizes it would be used only for pretrial proceedings).

Research discloses not a single commentator who has examined the question and found statutory support for the position taken by the federal courts. Seldom have courts and commentators diverged so widely in their treatment of a legal issue.

Self-transfer under section 1404(a), in fact, raises three tough legal questions. The first is whether a district judge to whom a case is transferred for "coordinated or consolidated pretrial proceedings" under section 1407 is authorized to pass on a section 1404(a) change of venue motion. The answer is not self-evident. A venue transfer motion is, to be sure, a pretrial motion and therefore arguably within the authority of the transferee court conducting "coordinated or consolidated pretrial proceedings." But there must be *some* pretrial motions MDL courts are not authorized to rule upon because section 1407(a) does not transfer the case for the conduct

of all pretrial proceedings, only those that are "coordinated or consolidated." The statutory language seems to limit the MDL court's authority to motions that implicate more than a single case—something that venue transfer motions, which call for an "individualized, case-by-case consideration of convenience," do not. *Van Dusen* v. *Barrack*, 376 U.S. 612, 622 (1964); *see also Stewart Organization, Inc.* v. *Ricoh Corp.*, 487 U.S. 22, 29 (1988) ("A motion to transfer under § 1404(a) . . . calls on the district court to weigh in the balance a number of case-specific factors . . . .").[8]

The legislative history bears out this interpretation; Congress apparently understood the term "pretrial proceedings" to "generally involve deposition and discovery." H. Rep. No. 1130, *in* 1968 U.S.C.C.A.N. at 1900. A venue transfer motion is not a discovery motion. In fact, a proper application of section 1404(a) often depends on information obtained through discovery, so venue transfer motions are seldom considered before discovery closes. *See, e.g., In re Equity Funding Corp. of America Sec. Litig.*, 416 F. Supp. 161, 178-79 (C.D. Cal. 1976); Stanley A. Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts*, 78 F.R.D. 575, 582 (1978); David F. Herr, *Multidistrict Litigation: Handling Cases Before the Judicial Panel on Multidistrict Litigation* 80 (1986); Robert J. Ward, *Multidistrict Litigation Procedures in the United States*, *in* The Trial Lawyer's Guide, at 249, 256 (John J. Kennelly ed. 1982) (all noting that transferee courts regularly postpone decisions on section 1404(a) motions until discovery is

[8] As I note below, shoehorning venue transfers into the concept of "coordinated or consolidated pretrial proceedings" requires a dramatic recalibration of the section 1404(a) calculus. *See* pp. 15818-23 *infra*. That MDL courts are unable to achieve consolidation for trial without twisting the standards of section 1404(a) beyond recognition ought to be a further clue that MDL courts have no business passing on venue transfer motions.

completed).[6] There is, therefore, a plausible case for holding that venue transfer motions are not among the powers of an MDL court.

And there is an excellent practical reason for so interpreting section 1407(a): If the MDL court grants a venue transfer motion, it cuts off the JPML's ability to comply with its statutory directive that it "shall" remand the case "to the district from which it was transferred." As one commentator noted, therefore, a change of venue motion "is of an entirely different nature than the powers" Congress intended to give MDL transferee courts. Trangsrud, 70 Cornell L. Rev. at 807.

It is true that an MDL court can dispose of the case by settlement or motion and thus prevent the JPML from remanding it.[7] But that is a possibility expressly accounted

[6] This was certainly the case here, as Judge Roll postponed deciding Lexecon's first change of venue motion (its initial remand request) until the end of discovery, at which time Milberg Weiss made its motion seeking self-transfer. Once discovery is completed, however, consolidated proceedings have ceased and there is no justification for allowing the transferee court to rule on the venue transfer motion; the motion could, just as easily, be ruled on by the originating district court after the case is remanded by the JPML.

Habitual procrastination of venue transfer decisions by MDL courts is ironic considering *Pfizer*'s big worry that, if the transferee court does not have authority to rule on a change of venue motion, no court would be able to do so during the course of pretrial proceedings. *See Pfizer*, 447 F.2d at 125 ("[T]o hold that the transferee court . . . has no section 1404(a) authority would mean that all proceedings on any section 1404(a) motion would have to be suspended for the entire period of pretrial. . . ."). This concern was especially misplaced because, so long as the case is partaking of "coordinated or consolidated pretrial proceedings" there is no need to transfer venue; indeed, any such transfer would defeat the purpose for which the case was consolidated in the first place.

[7] What kind of dispositive motions the MDL transferee court may rule on was once a subject of great controversy, but transferee courts, with the JPML's approval, now largely assume unlimited authority. *See* Levy, 40 Fordham L. Rev. at 60-61; *see also*

for in section 1407(a), which releases the JPML from its obligation to transfer the case back to its originating district if "it shall have been previously terminated." 28 U.S.C. § 1407(a). Had Congress also meant to release the JPML from its obligation in cases where venue is changed pursuant to section 1404(a), it could have said so. In fact, Congress said quite the opposite, at least in the legislative history of section 1407(a), where it repeatedly noted that the new statute "would not affect the place of trial in any case," H. Rep. No. 1130, *in* 1968 U.S.C.C.A.N. at 1900, and that "trial in the originating district is generally preferable from the standpoint of the parties and witnesses." *Id.* at 1901; *see* Roberts, 23 Mem. St. U. L. Rev. at 868 ("Clearly, the exact legislative history specifies that Congress never intended § 1407 by itself or . . . [through] tandem use with § 1404(a) . . . to alter the venue of ultimate trial.").[8]

Comment, *The Experience of Transferee Courts*, 89 U. Chi. L. Rev. at 588-89 ("After an initial period of hesitancy, transferee courts have steadily increased their control over pretrial proceedings far beyond the role envisioned by the drafters of the statute."). In fact, there is good reason to believe that Congress did not intend transferee courts to wield such unlimited authority. Had Congress wanted to authorize consolidated summary judgment procedures, it would have authorized the JPML to consolidate cases that presented common legal questions. Instead, Congress authorized consolidation only of cases that present "common questions of fact." Naturally, the JPML quickly ignored this limitation as well, and now routinely transfers cases where only common questions of law are at issue. *See, e.g.*, Levy, 40 Fordham L. Rev. at 48.

Whatever the *scope* of the MDL court's power to issue dispositive pre-trial orders, the *duration* of that power cannot extend beyond the time when "coordinated or consolidated pretrial proceedings" come to an end. At that point, there's no further justification for keeping the case in the MDL process and hence no authority for the MDL transferee court to enter further orders.

[8] The majority takes comfort from passages of legislative history that in fact support my view. *See* maj. op. at 15788-90. The first passage quoted by the majority clearly says that venue transfer under section 1407(a) is for the "limited purpose of conducting coordinated pretrial proceedings" and that "[i]t would not affect

It makes perfect sense for Congress to permit the transferee court to handle most pretrial legal issues—including some dispositive motions—and still insist that trial (if

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the place of trial in any case." H. Rep. No. 1130, *in* 1968 U.S.C.C.A.N. at 1900. Presumably, the majority relies on the portion of the quote which states that section 1407(a) would not "exclude the possibility of transfer under other Federal statutes." *Id.* I don't see how this helps the majority a bit. The passage merely affirms that, while the MDL statute would provide a special mechanism for transferring cases for pretrial purposes, all other venue transfer provisions remain in effect once the MDL procedure ends and the case is remanded. It surely couldn't have meant that transferee courts have the power to keep cases for trial when the rest of the quote says just the contrary.

The majority's second block quote is no more helpful. Presumably, again, the majority intends to emphasize the portion of the quote which allows, "Of course, 28 U.S.C. § 1404, providing for changes of venue generally, is available in those instances where transfer of a case for all purposes is desirable." *Id.* at 1902. But the majority omits, by way of an ellipsis, the two sentences preceding this quote, which help put it in perspective:

> Additionally, trial in the originating district is generally preferable from the standpoint of the parties and witnesses, and from the standpoint of the courts it may be impracticable to have all cases in mass litigation tried in one district. Additionally, the committee recognizes that in most cases there will be a need for local discovery proceedings to supplement coordinated discovery proceedings, and that consequently remand to the originating district for this purpose will be desirable.

Id. Nor does the majority quote the sentence that immediately succeeds its quote: "If proposed section 1407 should be enacted and future experience justifies extending it to include consolidation and coordination for trial purposes as well, only minor amendments to the present language of the bill will be necessary." *Id.* Sandwiched between these provisions, which make it clear that Congress was not intending to authorize MDL transferee courts to keep the cases sent to them for coordinated discovery, the sentence referring to section 1404 could only have been intended as another acknowledgment that the new MDL statute would not preclude normal venue tarnsfers by the court where the case was originally filed.

In any event, vague allusions in the committee reports cannot override the clear statutory language of section 1407, which effec-

there be one) be conducted in the district where the complaint was filed. Trial is a unique part of the litigation process in that it involves fact-finding, usually by a jury. Congress may have felt that federal judges are fungible for purposes of resolving legal questions, but that jurors—who reflect the sense of the community in adjudicating the rights and liabilities of their neighbors—are not. Congress also may have been willing to deny plaintiffs control over the pretrial forum, but thought it unfair to deny them control over the place of trial because jurors in the transferee district may have "background[s] . . . so different from that of jurors in [the transferor district] as to deprive plaintiffs of their constitutionally guaranteed right to a trial by a jury of their peers." *In re Air Crash Disaster near Hanover, New Hampshire*, 342 F. Supp. at 910.

Even assuming MDL transferee courts have authority to pass on ordinary venue motions, there is a second major question: May a court ever grant a motion to transfer venue *to itself*? Again, it helps to read the applicable statute, which in plain and simple terms provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any *other* district or division where it might have been brought." 28 U.S.C. § 1404(a) (emphasis added). I don't see how this language can be read to authorize a district court to transfer a case to itself. *See* Rhodes, 140

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tively forecloses venue transfer during the pendency of MDL procedures. This is precisely what one commentator who analyzed section 1407 before its enactment concluded: "[C]learly the [Coordinating C]ommittee's language [which was adopted into the House and Senate reports] is too ambiguous to provide any substantial justification for a court's reading section 1407 in a way opposed to its literal prohibition of transfers." Comment, *Consolidation of Pretrial Proceedings Under Proposed Section 1407 of the Judicial Code: Unanswered Questions of Transfer and Review*, 33 U. Chi. L. Rev. 558, 562 (1966). This commentator seems to have underestimated the creativity of federal judges.

U. Penn. L. Rev. at 740 ("A transferee court using § 1404(a) is not transferring a case to *another* district. It is simply proclaiming trial jurisdiction over the case." (emphasis in original)). Indeed, the drafters of section 1404(a) could not possibly have meant to authorize self-transfers because that section long predates section 1407; the possibility that a district court would be in a position to transfer a case to itself was not something anyone at the time could have anticipated.[9] Thus, this is not a case where the statutory language imperfectly reflects the intention of the drafters. The language of section 1404(a) precisely matches the understanding of the Congress that enacted it.

Are the federal courts nevertheless justified in tweaking section 1404(a) to make it yield up an authorization for self-transfer in the MDL context? Even under the best circumstances such judicial legerdemain would be awkward because it would require us to ignore the term "other" in section 1404(a). But these are not ideal circumstances because such manipulation creates a power

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[9] Defendants make a Rube Goldberg argument that Lexecon's case was, in fact, transferred to *another* district: Although transferred temporarily for pretrial purposes, the case was still technically pending in the Northern District of Illinois when the section 1404(a) transfer moved it to the District of Arizona, an "other district . . . where it might have been brought." *See* Br. of Milberg Defendants and of Cross-Appellant Milberg Weiss, at 25. Defendants seem to think that section 1404(a) merely requires that a case be transferred from one court to another.

This argument makes no linguistic sense because section 1404(a) provides that "*a district court* may transfer any civil action to any *other* district . . . ." 28 U.S.C. § 1404(a) (emphasis added). The phrase "any other district," which specifies the receiving court, stands in contrast to the earlier phrase "a district court," which refers to the court making the transfer. Or, to put it differently, the term "other district" must relate back to the term "district" within the same sentence. Thus, the court making the transfer cannot, under the terms of section 1404(a), be the same as the court receiving the transfer.

that Congress considered giving federal courts but expressly *rejected*. See p. 15805 *supra*.

This, then, is not a case where Congress passed two laws at different times and forgot to harmonize them. Congress, rather, made a deliberate choice to leave trial of cases subject to the MDL process in the district where they were filed. Given section 1407(a)'s explicit command that cases be remanded for trial in the district where they were filed, and legislative history making it clear that this was a deliberate choice, I don't' see how we can possibly fudge section 1404(a) to make it authorize self-transfer.

This question was not raised in *Pfizer* and no other federal court of appeals has ever considered it. The issue has been noted by commentators, and they have all concluded that self-transfer is not authorized by section 1404(a). *See, e.g., Rhodes*, 140 U. Penn. L. Rev. at 740-41 (arguing that using section 1404(a) in this way amounts to "creat[ing] a new 'venue' statute *sua sponte*.").

Even if we could overcome these first two hurdles, there is a third, equally daunting, one. Section 1404(a), at least as interpreted outside the MDL context, carries a strong presumption that plaintiff's choice of forum will not be disturbed. The presumption can be overcome only by a *compelling* showing that the convenience of parties and witnesses will be served by the transfer. *See* 15 Wright et al., § 3848, at 383. This interpretation of section 1404(a) is consistent with the traditional rule, which gave plaintiffs almost complete power to select the forum, *see Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 508 (1947) ("[T]he plaintiff's choice of forum should rarely be disturbed."), and a judicial recognition that, by passing section 1404(a), Congress intended to disturb the plaintiff's choice of forum only for very strong reasons.[10]

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[10] The Supreme Court in *Norwood v. Kirkpatrick*, 349 U.S. 29 (1955), upheld a section 1404(a) transfer away from a plaintiff's

In the MDL context, the traditional forum deference afforded plaintiffs disappears entirely. It's as if MDL courts are applying a mutated version of section 1404(a), one where a plaintiff's right to pick its venue has devolved to the significance of a tailbone or an appendix. Thus, MDL courts seldom even consider the rights of plaintiffs to their chosen forums, much less give this factor controlling weight. *See, e.g.*, Transgrud, 70 Cornell L. Rev. at 809 ("When confronted with section 1404(a) motions, transferee courts have denied transfers only where those transfers would have put the parties in an improper venue or were requested prematurely."). Instead, concerns for judicial economy trump all others: "Since [a section 1404(a) transfer in the MDL context] involve[s] multiple cases, the rights, interests, and convenience of the individual parties [are] swept aside in the drive toward apparent judicial economy." Levy, 40 Fordham L. Rev. at 65; *see also* 15 Wright et al., § 3867, at 626 (when granting section 1404(a) transfers "notions of party and witness convenience, which typically are at the heart of transfer motions under Section 1404(a), may be subordinated to the type of judicial economy concerns that are central to Section 1407"); Richard A. Chesley & Kathleen W. Kolodgy, *Mass Exposure Torts: An Efficient Solution to a Complex Problem*, 54 U. Cin. L. Rev. 467, 525 (1985) ("[T]he efficiency standards of section 1407 many times overshadow the important individual concerns that the courts examine under section 1404.").

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home forum, which would have been impermissible under the traditional forum non conveniens doctrine. The Court reasoned that section 1404(a) was intended to broaden the power of courts to order venue transfers. "[N]evertheless it has been consistently held since that decision that plaintiff's choice of a forum will not be disturbed unless the balance of convenience weighs heavily in favor of defendant." *Franklin* v. *Blaylock*, 218 F. Supp. 261, 262 (S.D.N.Y. 1963), *aff'd sub nom. Blaylock* v. *McLean*, 319 F.2d 533 (2d ed. 1963) (citations omitted); *see also* Stephen C. Yeazell et al., *Civil Procedure* 193 (3d ed. 1992).

Section 1404(a), thus, has not only been conscripted by the federal courts to serve ends Congress never had in mind for it, it has also been stripped of the prudential constraints designed to protect plaintiff's choice of forum. What this means in practice is that self-transfers are not occasional, isolated events based on an unusually strong showing of judicial economy; they are the norm. The simple reality is that once a case is sucked into the MDL vortex, it seldom comes back. *See In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d at 1178 (D.H. Ginsburg, J., concurring) ("In practice, the vast majority of transferred cases are so resolved, and do not return to the transferor courts."); *In re New York City Municipal Secs. Litig.*, 572 F.2d 49, 51 (2d Cir. 1978) ("[H]istory has indicated that once the limited transfer has occurred, the transferor district is not likely to see the case again.").[11]

No case better illustrates the dangers of this practice than the one now before us. Applying normal 1404(a) standards, a venue transfer of this case from Chicago to Arizona would never have been granted; the convenience of the parties and witnesses would not have been served by such a transfer, much less clearly outweighed plaintiffs' right to choose their forum. Of the four witnesses who testified at trial, two were from Chicago, none from Arizona.[12] Plaintiffs were from Chicago, defendants from California but represented by a lawyer from Chicago. The *only* connection between this case and Arizona was the trial judge.

Nor was the "interest of justice" clearly served by transfer to Arizona for trial. The trial lasted only five days

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[11] I've found no case where an MDL court has been reversed for transferring a case to itself for trial.

[12] Of the 42 witnesses whose depositions had been noticed or taken at the time the request for remand was filed by Lexecon, only one was from Arizona. *See* Plaintiffs' Motion to Remand at 9. A very fine witness, to be sure, but still only one.

and turned on Illinois law. *See Lexecon* v. *Milberg Weiss*, 884 F. Supp. 1388 (D. Az. 1995) (applying Illinois law to Lexecon's defamation claim). Any advantage Judge Roll might have enjoyed in dealing with the facts was offset by the advantage a Chicago district judge would have had in instructing the jury as to Illinois law.[13]

No matter how you jiggle these factors, it's hard to come up with a plausible argument that trial in Arizona was more appropriate than trial in Chicago. Yet, as section 1404(a) is normally interpreted, a plaintiff's choice of forum can only be overcome if the transferee district is *clearly* more advantageous than the transferor district. Plaintiff's selection of its own home forum, when that forum is related to the subject matter of the suit, is entitled to even greater deference because both plaintiff and the community have an interest in resolving the controversy at home. *See, e.g., General Foam Plastics Corp.* v. *Kraemer Export Corp.*, 806 F. Supp. 88, 89 (E.D. Va. 1992); *Continental Airlines, Inc.* v. *American Airlines, Inc.*, 805 F. Supp. 1392, 1395-96 (S.D. Tex. 1992).[14] Instead, Lexecon was forced to trial in a forum

[13] This was not even a situation where the parties and witnesses were already going to trial on related claims so it would have been convenient to try this case at the same time. *Cf. In re Fine Paper*, 685 F.2d at 820 ("[P]laintiffs' convenience was outweighed by the comparative economy of trying one case in the Eastern District rather than several actions in the [plaintiffs'] home districts."). All other cases involving Lincoln Savings had long since been resolved.

[14] The rationale behind this rule is brought home by considering whether a Chicago or Arizona jury would better appreciate the following attempt by Lexecon's counsel to evoke sympathy for his client during summation:

> And as a kid, I used to go into Chicago and see these great skyscrapers, and through them you would see Lake Michigan glimmering in the distance. And about this time of the year, the pavement would shimmer with heat. About right now in Chicago, people in Lexecon are getting out of work and they are going to their cars and going to the subway, and they are thinking maybe about what is happening out here, and wondering: Will Lexecon continue to be the kind of fine organization that Dan Fischel built it to be? Will they have a future?

RT at 234-35 (July 31, 1995).

where there was much popular feeling against Lincoln Savings, Charles Keating and those (like plaintiffs) who were associated with them.[15] It was also a forum where a respected district judge felt so strongly that plaintiffs' claim was unjustified that he found it necessary to recuse himself. *See* maj. op. at 15781.[16]

[15] Not surprisingly, defense counsel peppered his arguments with references to Charles Keating's misdeeds and defendants' attempts to recover money for the victims, whom counsel described as "those retired people, the 23,000 people who got robbed, raped and peltered [sic] by Charles Keating." RT at 187 (July 31, 1991). Defense counsel also made much of the fact that, by settling the *Lincoln Savings* case, Lexecon avoided the verdict of an Arizona jury, and then ran off to Chicago and filed suit. *See id.* at 215 ("Now, as I said [before], if Lexecon wanted vindication, it could have taken its case to the jury. It did not. It paid $700,000. That is fine. But then it shouldn't have gone back to Chicago and thrown that $15 million brick at [defendants by filing suit]. It shouldn't have done that.").

[16] As the majority notes, Judge Bilby went so far as to amend the record in the earlier proceeding by entering an order explicating his view of the settlement and deriding Lexecon for having brought this lawsuit. Judge Bilby no doubt was sincere in his views but his order amounted to little more than testimony about his perception of the settlement. As this statement was not subject to the normal safeguards applicable to witnesses—such as cross-examination and impeachment—I find it troubling that the majority relies on it in characterizing Lexecon's case. *See* maj. op. at 15781-83.

Although Judge Roll had nothing to do with this order, he may have been influenced by his colleague's strong feelings, and thus "we [might] consider prior judicial experience in such a situation more a negative than an affirmative reason for transfer." *Codex Corp.* v. *Milgo Electronic Corp.*, 553 F.2d 735, 739 (1st Cir.), *cert. denied*, 434 U.S. 860 (1977). Moreover, defense counsel repeatedly referred to the sentence from Judge Bilby's order characterizing Lexecon's complaint as "a false description of the conditions under which [it] was dismissed from [the *Lincoln Savings*] case." De-

In ordering the self-transfer, the district court did not consider *any* of the traditional section 1404(a) factors. The court simply noted its familiarity with the case and concluded that it would be wasteful to have another judge conduct the trial. *See* Order, May 2, 1995. Such considerations of judicial economy—standing alone—have never before been sufficient to justify a section 1404(a) transfer. *See, e.g., Warrick* v. *General Electric Co.*, 70 F.3d 736, 740 (2d Cir. 1995) (per curiam) (judicial economy "is not alone sufficient" to justify a transfer); *Wash. Pub. Util. Group*, 843 F.2d at 326 ("[A] federal court may not order transfer under section 1404(a) solely for its convenience."); *Codex Corp.*, 553 F.2d at 739 ("[W]e have found no case where [the desire for consolidation] has carried the day against factors pointing in the other direction."); *Max Planck* v. *General Elec. Co.*, 858 F. Supp. 380, 382 (S.D.N.Y. 1994) (noting that court expertise with the subject matter of a case is an "irrelevant" consideration under section 1404(a)). If familiarity with the case in a five-day, four-witness, one-horse trial is sufficient to justify a section 1404(a) transfer, the case simply does not exist where judicial economy will not trump a plaintiff's right to a trial in his home district.

The majority points to JPML Rule 14(b) as authority for Judge Roll's action. *See* maj. op. at 15789-90 n. 7. But the rule governs only the internal procedures of the JPML, not the authority of the district court. *See* J.P.M.L. R. Proc. 14(b) ("In the event that the transferee judge so transfers an action under 28 U.S.C. § 1404(a) or 1406, no further action of the Panel shall be necessary to authorize further proceedings including trial."). Nor could it, since section 1407(f) only empowers the JPML

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fense counsel made sure the jury understood just who Judge Bilby was: "Judge Bilby learned of this lawsuit and Judge Bilby entered an order. The judge sitting across the street, the former Chief Judge of this district." RT at 193 (July 31, 1995).

"to prescribe rules for the conduct of *its* business." 28 U.S.C. § 1407(f) (emphasis added).[17]

But even if Rule 14(b) somehow purported to do what the majority ascribes to it, we would still have to consider what weight to attribute to it. JPML rules are not subject to the rigorous promulgation process of the Rules Enabling Act: They are not voted upon by the Judicial Conference of the United States; they are not adopted by the Supreme Court; they are not put before Congress for possible modification or rejection. *See* 28 U.S.C. §§ 2072-74. Nor do they have the dignity of executive branch regulations promulgated pursuant to a substantive grant of rule-making authority. *See Chevron U.S.A.* v. *NRDC*, 467 U.S. 837, 843-44 (1984). The JPML's rules have the force of local district court rules, which are authorized by a statute almost identical to section 1407(f). *See* 28 U.S.C. § 2071(a) ("[A]ll courts established by Act of Congress may from time to time prescribe rules for the conduct of their business."). As such, they are entitled to deference only to the extent they cover the JPML's business; they cannot broaden the transferee court's authority to act under section 1404(a). *See* 12 Wright et al., § 3153, at 228 ("[A] local rule is invalid if it makes 'basic procedural innovations' that should be left to the rulemaking power of the Supreme Court, surrounded, as that is, by statutory procedures that ensure mature consideration of informed opinion." (quoting

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[17] The JPML itself takes the position that it has no authority to tell MDL transferee courts what actions to take in the cases entrusted to them, including whether to grant section 1404(a) venue transfers. *See, e.g., In re Air Crash Disaster Near Chicago*, 476 F. Supp. at 450 ("[T]he Panel has neither the authority nor the desire to control decisions of the transferee judge made in the actual conduct of coordinated or consolidated pretrial proceedings[, including section 1404(a) determinations]."); *In re Westinghouse Electric Corp. Uranium Contract Litig.*, 436 F. Supp. 990, 996 (J.P.M.L. 1977) ("The Panel has neither the power nor the inclination to dictate in any way the manner in which judges process actions pending before them.").

Miner v. *Atlass*, 363 U.S. 641, 650 (1960)); *see also* Jack B. Weinstein, *Reform of the Federal Rule-making Process*, 63 A.B.A. J. 47, 47 (1977) ("There is no real opportunity even to challenge [local] rules in litigation since the judges who will decide the case are often the ones who adopted the rules.").

The majority also takes comfort from the fact that it reaches a result that is consistent with current practice—which must be the case given how seldom cases are returned for trial in the original district once they become ensnared in the MDL web. But a practice unsupported by thoughtful analysis, one that flies in the face of three clear statutory commands, surely is entitled to little weight. Moreover, this is not a case where we can read congressional silence as signifying approval of a particular statutory interpertation, a doctrine that is "at best treacherous," *Girouard* v. *United States*, 328 U.S. 61, 69 (1946), and at worst "a canard." *Johnson* v. *Transportation Agency*, 480 U.S. 616, 672 (Scalia, J., dissenting); *see Patterson* v. *McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989) (pointing out the "danger of placing undue reliance on the concept of congressional 'ratification' "). If acquiescence by silence can ever carry the day, it can do so only in areas such as the tax law where Congress exercises vigorous oversight or amends the statute frequently. Neither is the case here. Congress has amended the MDL statute only once in almost thirty years [18] and there is no indication that any of its committees exercises oversight in this area.[19] To the contrary,

[18] In 1976, Congress added section 1407(h) to provide for consolidation of cases filed under a newly added section 4C of the Clayton Act. *See* Pub. L. No. 94-435, tit. III, § 303, 1976 U.S.C.C.A.N. (90 Stat.) 1383, 1396.

[19] Congressional silence in the face of the self-transfer practice is especially problematic considering how inconspicuous the practice is. First, there are no accurate statistics on how many cases are subjected to self-transfer; neither the JPML nor the Administrative Office of the United States Courts nor the Federal Judicial Center keeps track. All we know is that lots of cases are subjected to the MDL process and very few ever get remanded. Second, the MDL statute continues to be portrayed as a mechanism affecting only pretrial, not trial, making "MDL appear to do less than it does." Judith Resnik, *From "Cases" to "Litigation"*, 54 Law & Contemp. Probs. 5, 47 (Summer 1991).

this is an area where Congress relies on the judiciary to point out problems and propose solutions, as it did when section 1407 was first passed.

The MDL statute, it will be recalled, was the brainchild of the federal judiciary: The Coordinating Committee for Multiple Litigation in the U.S. District Courts, established by the Judicial Conference of the United States, brought the problem to the attention of Congress, wrote the statute, lobbied for its adoption and explained to Congress exactly how it would work. *See* H.R. 1130, *in* 1968 U.S.C.C.A.N. at 1899. The Coordinating Committee eschewed the possibility of trial in the transferee court,[20] and never mentioned self-transfer as even a remote possibility.[21] Congress clearly understood the limited

[20] The Committee stated that "[t]he major innovation proposed is transfer solely for pre-trial purposes," which would achieve efficiency "without losing the benefits of local trials." *Report of the Co-Ordinating Committee on Multiple Litigation Recommending New Section 1407, Title 28* (Mar. 2, 1965), *reprinted in In re Plumbing Fixture Cases*, 298 F. Supp. 484, 498, 499 (J.P.M.L. 1968). As a result of the increased efficiency during pretrial, the Committee claimed that section 1407 would actually "*maximize* the litigant's traditional privileges of selecting where, when and how to enforce his substantive rights or assert his defenses." *Id.* (emphasis added).

[21] The Coordinating Committee explained that section 1407 "would not affect the place of trial in any case or exclude transfer under other statutes (e.g., Title 28, U.S.C. §§ 1404(a) and 1406(a)) prior to or at the conclusion of pre-trial proceedings." *Report of the Co-Ordinating Committee on Multiple Litigation Recommending New Section 1407, Title 28* (Mar. 2, 1965), 298 F. Supp. at 499. By using the phrase "prior to or at the conclusion of pre-trial proceedings," the Committee clearly indicated that a venue trans-

nature of the proposal and invited the federal judges to return if authorization for consolidated trials became necessary. *See id.* at 1902. The judges never bothered to return; instead, they seized the power by prescription.

* * * *

Despite the complicated nature of these proceedings, the question before us is rather straight-forward: Did the district court abuse its discretion in transferring the case to itself under section 1404(a)? It clearly did because MDL courts have no authority to pass on venue transfer motions, because section 1404(a) doesn't authorize self-transfer and because the factors favoring transfer are far too weak to overcome plaintiffs' right to a trial in their home district. We must therefore vacate that order and all subsequent orders entered by the district court, including, of course, the final judgment entered after trial.[22] The case should then be in a posture where plaintiffs would finally be free to petition the MDL panel for transfer back to the Northern District of Illinois. By approving this transfer, we complete the judicial arrogation of power in this area and put the last coffin nail into the experiment Congress started in 1968 when it gave the federal courts only a limited MDL authority. I will not be one of the pallbearers. I dissent.

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fer would only be available before or after, but not while, the case was in the MDL court. *See* Comment, *Consolidation of Pretrial Proceedings*, 83 U. Chi. L. Rev. at 562.

[22] In point of fact, at the time Lexecon made its first request for remand on August 5, 1994, all coordinated and/or consolidated pretrial proceedings—to the extent there ever were any—had come to an end. All orders entered by the district court after that date were beyond its authority as they did not relate to the limited purpose for which the case was transferred under section 1407(a). *See* note 7 *supra*. These orders, particularly the summary judgment granted on April 24, 1995, should be vacated.

APPENDIX B

[Filed Aug. 7, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MDL Docket No. 834
No. CIV-93-1087-PHX (JMR)
Judge John M. Roll

IN RE AMERICAN CONTINENTAL CORPORATION/
LINCOLN SAVINGS & LOAN SECURITIES LITIGATION.

LEXECON INC.,
Plaintiff,

v.

MILBERG WEISS BERSHAD HYNES
& LERACH and KEVIN P. RODDY,
Defendants.

JUDGMENT IN A CIVIL CASE

XXX *JURY VERDICT.* This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

DECISION BY THE COURT. This action came under consideration before the Court. The issues have been considered and a decision has been rendered.

THE JURY FINDS IN FAVOR OF DEFENDANTS KEVIN P. RODDY AND MILBERG

WEISS BERSHAD HYNES & LERACH AND AGAINST PLAINTIFF LEXECON INC.

IT IS HEREBY ORDERED THAT JUDGMENT IS ENTERED IN ACCORDANCE WITH THE JURY VERDICT AND THAT THIS CASE IS DISMISSED.

RICHARD H. WEARE
Clerk

/s/ M. HARDEMAN
By Deputy Clerk
Marilyn Hardeman

Aug. 1, 1995

APPENDIX C

[Filed Jul. 21, 1995]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-70380
DC# CV-93-1087-PHX

LEXECON INC., *et al.*,
Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA,
Respondent,

and

MILBERG WEISS BERSHAD HYNES & LERACH, *et al.*,
Real Parties in Interest.

Petition for Writ of Mandamus
in the United States District Court
for the District of Arizona
John M. Roll, District Judge, Presiding

Argued and Submitted July 17, 1995
San Francisco, California

Before: FLETCHER, KOZINSKI and THOMPSON, Circuit Judges

MEMORANDUM*

In this petition for writ of mandamus, petitioners ask this court to: (1) vacate the district court's order which permanently transferred the above-entitled case to the District of Arizona pursuant to 28 U.S.C. § 1404(a); and (2) direct the district court to remand this case to the Northern District of Illinois pursuant to 28 U.S.C. § 1407. Petitioners also have filed a motion to stay the district court proceedings pending our decision. We deny the petition for writ of mandamus and deny the motion to stay as moot.

This court considers five factors in deciding whether a case is appropriate for mandamus relief: (1) whether the petitioner has no other adequate means, such as a direct appeal, to attain the relief desired; (2) whether the petitioner will be damaged or prejudiced in a way not correctable on appeal; (3) whether the district court's order is clearly erroneous as a matter of law; (4) whether the district court's order is an oft-repeated error; and (5) whether the district court's order raises new and important problems, or issues of first impression. *Bauman v. United States Dist. Court,* 557 F.2d 650, 653 (9th Cir. 1977). The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. *Wash. Pub. Util. Group v. U.S. Dist. Court,* 843 F.2d 319, 323 (9th Cir. 1987) ("WPPSS").

Here, as to the first factor, we are not satisfied that petitioners cannot attain the relief they request on direct appeal. The case is scheduled for trial on July 25, 1995. The trial, we understand, will be of short duration. The

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

transfer order can be appealed immediately along with other issues in the event the petitioners lose on the merits.

As to the second factor, petitioners contend the expense and inconvenience of what may be an unnecessary trial in the District of Arizona meets the second *Bauman* factor. They rely on *Sunshine Beauty Supplies* for the proposition that "the prejudice that results from an erroneous transfer order is of a type not correctable on appeal." *Sunshine Beauty Supplies v. U.S. Dist. Court,* 872 F.2d 310, 311 (9th Cir. 1989).

Petitioners' reliance on *Sunshine Beauty Supplies* is misplaced. There, the district court's transfer order would have required the plaintiff, who sought confirmation of an arbitration award in the district court in California, to travel to Texas to present its claim. Here, the parties are already before the federal district court in Arizona and have been for more than a year as they pursued discovery. The district court's order transferring the present case to itself for trial simply leaves the parties where they are. It does not force them to go to another district to try their case. Petitioners have not shown how they would be prejudiced by conducting what is scheduled to be a four-day trial in the district where they have been litigating for more than a year. *Cf. Varsic v. U.S. Dist. Ct.,* 607 F.2d 245, 252 (9th Cir. 1979) (substantial prejudice shown by plaintiff who would have had to travel some 3,000 miles to prosecute his action).

As to the third factor, we cannot say the district court's order transferring this case to itself for trial is clearly erroneous as a matter of law. A question of law is clearly erroneous if we are left with the definite and firm conviction that a mistake has been made. *United States v. Harper,* 729 F.2d 1216, 1222 (9th Cir. 1984). Here, petitioners contend the district court clearly erred by: (1) ignoring 28 U.S.C. § 1407, which instructs that the case be remanded for trial to the Northern District of

Illinois; and (2) transferring the case to itself under 28 U.S.C. § 1404(a).

We are not prepared to say that these contentions lack merit. However, despite what appears to be a clear statutory mandate, Multidistrict Litigation Rule 14(b) explicitly authorizes a transferee court to transfer the action to itself for trial pursuant to 28 U.S.C. § 1404(a) and the district court's decision is supported by case law. *See In Re Fine Paper Antitrust Litigation*, 685 F.2d 810, 820 (3rd Cir. 1982); *Pfizer v. Lord*, 447 F.2d 122, 125 (2d Cir. 1971); *see also WPPS* at 326 (transferee court has authority to sua sponte change venue). Further, petitioners have cited no case law to the contrary. Although upon review on direct appeal, we might well reach the opposite result, it is not possible for us to hold at this juncture that the district court's decision is clearly erroneous. *See Harper*, 729 F.2d at 1222. In any direct appeal the merits panel is free to examine all of the issues.

Although there may be oft-repeated error in other circuits, petitioners do not demonstrate how the fourth *Bauman* factor applies in this circuit. While the fifth factor may be met, we conclude that in this case resolution is available on direct appeal in a setting more conducive to adequate briefing and full deliberation. We see no emergent need for instant resolution.

Accordingly, the petition for writ of mandamus is DENIED. The motion to stay is denied as moot.

Kozinski, Circuit Judge, dissenting.

I would grant the writ to correct an egregious, oft-repeated error in the interpretation of 28 U.S.C. §§ 1404, 1407. Section 1407(a) authorizes the Multidistrict Panel to transfer cases for *pretrial* proceedings; after those proceedings are completed, and before trial, "[e]ach action so transferred *shall* be remanded by the panel." (emphasis added). It's hard to imagine a clearer statutory command, or one more widely ignored.

Starting with the Second Circuit's summary treatment in *Pfizer, Inc.* v. *Lord*, 447 F.2d 122, 124-25 (2d Cir. 1971), the federal courts have simply disregarded the statutory mandate *Pfizer* and a few subsequent cases have recognized they weren't following the statute, but justified their departure on grounds of policy or convenience. *See, eg., Pfizer*, 447 F.2d at 124-25 (rejecting as absurd a result that would delay section 1404(a) motions until after remand); *In re Air Crash Disaster Near Hanover, New Hampshire*, 342 F. Supp. 907, 909 (D.N.H. 1971) ("I must recognize candidly that there is nothing in the language of 28 U.S.C. § 1407(a) or 1404(a) which directly allows, or even suggests, that the transferee judge has the power to transfer cases to his district, or any district, for purposes of trial."). Most have simply taken their place at the head of an ever-growing string cite. The Multidistrict Panel went so far as to enshrine this unlawful practice into one of its rules, J.P.M.L.R.P. 14(b), and the Federal Judicial Center's *Manual for Complex Litigation (Third)* § 21.61 (1995), mentions it as a standard option. Seldom have so many been so consistently wrong.

The time has come to put a stop to this illicit practice by saying loud and clear that the Multidistrict Panel assigns cases only for pretrial proceedings; it doesn't grant proprietary rights in them. Indeed, I consider it unseemly for district judges who have been entrusted cases for limited purposes to routinely glom onto them. It's true that section 1407(a) gives transferee courts power over pretrial proceedings and venue transfer motions under section 1404(a) fall under that general heading. But this presents no irreconcilable conflict between sections 1404 and 1407: Pretrial proceedings under 1407 are obviously limited to those raising issues common to other cases, primarily discovery; that's the entire point of the multi-

district process. Under section 1407, the Multidistrict Panel retains the power to transfer the case and that power is carefully limited to accomplish the statute's purpose. This precludes use of the general transfer section by district judges to subvert the panel's responsibility.

Section 1407 reflects an important policy choice: Cases may be transferred to remote locations, but only for the duration of pretrial procedures. When it comes to conducting a trial (and resolving other dispositive matters) plaintiffs retain their ancient right to select the forum. Had Congress meant to empower the Multidistrict Panel to reassign cases for resolution of dispositive matters, including trial, it would have drafted the statute much differently. This is a policy choice federal judges are bound to respect, regardless of their views of efficiency or their fondness for particular cases.

Petitioners here were dragged hundreds of miles from their home district in Illinois to appear before a judge in Arizona who had no familiarity with the case or expertise in the issues; they participated in no common proceedings; they benefitted from no coordinated discovery; and they are now forced to go to trial in the remote district because, having needlessly been required to spend so much time in Arizona, it makes no sense to send them back. There's a warped logic to each step in this process, but the net effect is to undercut the important policy of section 1407. That the matter comes up on appeal so seldom —and will likely be washed out by trial or settlement before it can come to us again in this case—makes it the more urgent for us to resolve the issue and put an end to an illicit practice that has developed willy-nilly during the last quarter century. If not we, who? If not now, when?

APPENDIX D

[Filed May 5, 1995]

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

(CIVIL ORDER—GENERAL)

MDL 834 PHX RMB
Civil Case No. CV93-1087 PHX JMR

LEXECON

v.

MILBERG WEISS

Date: May 2, 1995

HONORABLE JOHN M. ROLL

Pending before the Court are cross-motions relating to venue, Milberg Weiss' motion for sanctions, and plaintiffs' motion to strike amended interrogatory response.

As to venue, plaintiffs argue that the MDL statute, 28 U.S.C. § 1407, requires this Court to transfer this case to the MDL panel so that it may return to the Northern District of Illinois. Plaintiffs admit that no court has so construed that statute. Substantial authority exists to the contrary. Multidistrict Litigation Rule 14(b); *In re Fine Paper Antitrust Litig.*, 685 F.2d 810 (3d Cir. 1982); *In re Air Crash Disaster Near Chicago, Illinois*, 476 F. Supp. 445 (J.P.M.L. 1979). Under this authority, the Court concludes that it has the power to transfer this action to itself or any other court. 28 U.S.C. §§ 1404 and 1406.

Under § 1404(a)'s balancing test, the Court finds that the interest of justice is best served by transferring this action to itself. In light of the one claim which remains in

this case for trial, judicial economy heavily weighs in favor of this Court continuing to exercise jurisdiction over this case.

On the remaining motions in this matter, the Court finds that plaintiffs' motion to strike is moot and concludes that defendant's motion is not properly before the Court because Local Rule 1.10(j) requires that counsel first confer in an effort to resolve the dispute prior to seeking the Court's intervention. Furthermore, as to the merits, the imposition of sanctions is unwarranted.

Therefore, IT IS HEREBY ORDERED that plaintiffs' motion to refer the case back to the Multidistrict Litigation Panel IS DENIED and Milberg Weiss' motion to transfer the case to this Court IS GRANTED.

IT IS FURTHER ORDERED that plaintiffs' motion to strike amended interrogatory response IS DENIED as moot.

IT IS FURTHER ORDERED that Milberg Weiss' motion for sanctions IS DENIED.

IT IS FURTHER ORDERED that a pretrial conference is hereby set in this matter for Tuesday, May 30, 1995 at 4:00 p.m. Counsel are directed to submit a joint proposed pretrial order by May 22, 1995, in accordance with the form attached.

/s/ John M. Roll
JOHN M. ROLL
United States District Judge

[Filed Jan. 7, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MDL Docket No. 834
CV 93-1087 PHX JMR

IN RE AMERICAN CONTINENTAL/LINCOLN SAVINGS & LOAN SECURITIES LITIGATION.

LEXECON INC. and DANIEL R. FISCHEL,
Plaintiffs,

vs.

MILBERG WEISS BERSHAD HYNES & LERACH, *et al.*,
Defendants.

ORDER

The Court having previously granted summary judgment in favor of defendants Cotchett, Illston & Pitre, Joseph Cotchett, and Susan Illston, and there being no just reason for delay of entry of a final judgment in their favor pursuant to Rule 54(b), Federal Rules of Civil Procedure.

IT IS HEREBY ORDERED that plaintiffs' claims against said defendants ARE DISMISSED WITH PREJUDICE.

Dated this 2nd day of June, 1995.

/s/ John M. Roll
JOHN M. ROLL
United States District Judge

APPENDIX E

[Filed Apr. 24, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MDL Docket No. 834
CV 93-1087 PHX JMR

IN RE AMERICAN CONTINENTAL/LINCOLN SAVINGS & LOAN SECURITIES LITIGATION.

LEXECON, INC. and DANIEL R. FISCHEL,
Plaintiffs,

vs.

MILBERG WEISS BERSHAD HYNES & LERACH, a partnership; COTCHETT, ILLSTON & PITRE, a partnership; and PATRICK COUGHLIN, WILLIAM S. LERACH, KEVIN P. RODDY, LEONARD B. SIMON, MELVYN I. WEISS, PATRICIA HYNES, MICHAEL C. SPENCER, STEPHEN STEINBERG, JOSEPH COTCHETT, and SUSAN ILLSTON, individually,
Defendants.

Pending before the Court are defendants' motions for summary judgment in connection with the remaining claims of plaintiffs and plaintiffs' motion to dismiss the Milberg Weiss defendants' counterclaims. Defendants are the law firm of Milberg, Weiss, Bershad, Hynes and Lerach, and certain individually named firm members ("Milberg Weiss"), and the law firm of Cotchett, Illston and Pitre and partners Joseph Cotchett and Susan Illston ("Cotchett, Illston and Pitre").

Factual and Procedural Background

The factual background concerning this matter is set forth in a previous Order issued by this Court. *In re American Continental Corp./Lincoln S&L Sec. Lit.: Lexecon, Inc. v. Milberg Weiss,* 845 F. Supp. 1377 (D.Ariz. 1993). That Order resulted in the dismissal of malicious prosecution and abuse of process claims of plaintiffs and the dismissal of most defamation claims. Still pending are (1) plaintiffs' defamation claim against all defendants arising from the distribution of the proposed Sixth Amendment Complaint; (2) plaintiffs' defamation claim against the Milberg Weiss defendants based upon the Roddy letter to the *National Law Journal*; (3) plaintiffs' tortious interference and commercial disparagement claims against the Milberg Weiss defendants; and (4) the Milberg Weiss defendants' counterclaims. This Order addresses the defendants' motions for summary judgment as to all of these remaining claims of plaintiffs and plaintiffs' motion to dismiss the Milberg Weiss defendants' counterclaims.

Sixth Amended Complaint

The Court previously denied defendants' motion to dismiss plaintiffs' defamation claim arising from Milberg Weiss' dissemination of the proposed Sixth Amended Complaint.

Facts

On March 26, 1990, defendants disseminated to the service list a proposed Fifth Amended Complaint in the *Lincoln Savings* litigation, adding Lexecon and Daniel Fischel as defendants. The proposed complaint was accompanied by a motion for leave to file. The Hon. Richard M. Bilby, the judge to whom the *Lincoln Savings* case was assigned, denied without prejudice the motion to file that complaint as it related to Lexecon and Fischel.

Thereafter, the decision was made by class counsel to again attempt to sue Lexecon and/or Daniel Fischel. The

task of writing that portion of the proposed Sixth Amended Complaint relating to Lexecon fell to Milberg Weiss partner Kevin Roddy. Soliciting input from Milberg Weiss partners Leonard Simon and William Lerach and co-lead counsel Joseph Cotchett of the law firm of Cotchett, Illston and Pitre, Roddy's complaint named both Lexecon and Fischel as defendants. On Friday, December 14, 1990, Roddy, working alone in Milberg Weiss' Los Angeles office, determined that the complaint was finalized and sent it to all the attorneys appearing on the MDL 834 service list, pursuant to Judge Bilby's management order.[1] This complaint totalled 231 pages. Roddy also gave instructions for the Sixth Amended Complaint to be filed with the District Court of Arizona.

When Simon, the class counsel responsible for that portion of the case dealing with Lexecon, learned of Roddy's dissemination of the proposed Sixth Amended Complaint, he notified Arizona counsel not to file the documents. On December 18, 1990, only four days after Roddy had disseminated the proposed complaint, a revised Sixth Amended Complaint which named Lexecon as a defendant but deleted Fischel as a party was filed with the court and disseminated to the service list.[2]

Discussion

Plaintiffs maintain that dissemination of the proposed Sixth Amended Complaint by Roddy on December 14, 1990, listing Fischel as a defendant, constitutes an intentional and deliberate defamatory act by defendants in furtherance of a conspiracy to destroy them. Because an attorney from the firm of Cotchett, Illston and Pitre signed the aborted Roddy complaint and that firm was co-lead counsel with Milberg Weiss in *Lincoln Savings*, Cotchett, Illston and Pitre are also alleged to have been participants in this conspiracy.

[1] Although one could infer to the contrary from Lexecon's complaint, it is now clear that Roddy only disseminated the Sixth Amended Complaint to the service list. While that list is admittedly a lengthy one (101 attorneys), Lexecon does not allege that the complaint was disseminated to disinterested third parties.

[2] On December 17, 1990 Simon sent a letter to the service list instructing recipients to disregard the previous motion. This letter did not specifically state that the difference between the two complaints was that Daniel Fischel was not named as a defendant in the latter.

In support of their allegations, plaintiffs point to a disturbing history of acrimonious statements made by members of the Milberg Weiss firm concerning Fischel. These statements are set forth in detail in the discussion below concerning plaintiffs' tortious interference and commercial disparagement claims.

The December 14, 1990 proposed Sixth Amended Complaint must be considered in context. Plaintiffs maintain that inclusion of Fischel as a defendant in that complaint was intended to defame. The Fifth Amended Complaint, however, also listed Fischel as a defendant and identified the same alleged conduct by Fischel. Furthermore, the revised Sixth Amended Complaint that was ultimately filed on December 18, 1990, contained virtually all of the allegations against Fischel set forth in the aborted Sixth Amended Complaint. The only significant difference between the proposed Sixth Amended Complaint circulated by Roddy on December 14, 1990, and the Sixth Amended Complaint that was filed December 18, 1990, is that Fischel is not named as a defendant in the latter complaint.[3] Roddy and Simon have sworn that the

[3] The Sixth Amended Complaint, attached as an exhibit to the December 18, 1990 motion for leave to file an amended complaint, differed from the Roddy complaint in the following respects: (1) Fischel was deleted from the caption; (2) twelve references to "defendants Lexecon and Fischel" in the body of the complaint were changed, nine times to "defendant Lexecon and Fischel" and three times to "defendant Lexecon"; and (3) six references to "defendant Fischel" were changed, five times to "Fischel" and the sixth reference was deleted. However, it still incorrectly contained three references to "defendants Lexecon and Fischel" and one reference to

December 14, 1990 dissemination of the Sixth Amended Complaint by Roddy was simply a mistake. No direct evidence controverts this testimony.[4]

To establish defamation based upon Roddy's dissemination of the proposed Sixth Amended Complaint, plaintiffs must show that the complaint was false and defamatory and that defendant Roddy acted with knowledge of the falsity of the allegations or with reckless disregard for the truth or falsity thereof. *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964). Furthermore, because Fischel is a "limited-purpose public figure,"[5] were this claim to proceed to trial, plaintiffs would have the burden of proving this last element by clear and convincing evidence.[6] *Id.*, 376 U.S. at 285-86.

Summary judgment is appropriate. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). No reasonable jury could find that defendants intentionally disseminated a complaint and withdrew it four days later in order to harm plaintiff Daniel Fischel.[7] Because the evidence

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"defendant Fischel." When Judge Bilby granted the motion for leave to file the Sixth Amended Complaint on February 15, 1991, the Sixth Amended Complaint which was filed that day corrected the erroneous references to Fischel.

[4] Plaintiffs' only evidence countering this testimony is the inferences to be drawn from the long-running feud between plaintiffs and defendants.

[5] The distinction between a "limited-purpose public figure" and a "public figure" is discussed in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974). Here, because all references to Fischel are directly related to his public figure status as an expert in the securities field, he is treated as a public figure.

[6] The Ninth Circuit has recently clarified that this is the only element of the defamation action which must meet this heightened standard of proof. *Rattray v. City of National City*, No. 92-55791 (9th Cir. filed Oct. 7, 1994, amended March 21, 1995).

[7] The Court also finds that the record, after full and thorough discovery, lacks sufficient evidence to support an alternative finding of recklessness on the part of Roddy, Simon, or other Milberg Weiss defendants.

against the Cotchett, Illston and Pitre defendants is far less persuasive than that against the Milberg Weiss defendants, their motion for summary judgment must also be granted.

The Kevin Roddy Letter to the National Law Journal

This Court previously denied defendants' motion to dismiss defamation claims based upon the letter submitted by Kevin Roddy to the *National Law Journal*.

Facts

On December 14, 1992, the *National Law Journal* printed a story concerning the *Lincoln Savings* litigation. Randall Samborn, *Firms Sued in Wake of Lincoln S&L Case*, National Law Journal, December 14, 1992 at 2. There is no evidence that Lexecon or Daniel Fischel were responsible for the publication of this article.

In response to that article, Kevin Roddy wrote a letter to the *National Law Journal*. Kevin P. Roddy, *Defendants Tell Their Side of Lexecon Suit*, National Law Journal, March 8, 1993 at 16.

Discussion

Plaintiffs argue that Roddy's letter was false and defamatory because the letter stated: (1) Judge Bilby, in a published opinion, had detailed Lexecon's "wrongful activities on behalf of convicted felon Charles H. Keating, Jr.'s American Continental Corporation and Lincoln Savings and Loan in fraudulent dealings with federal regulators"; (2) Lexecon had "settled" with plaintiffs; and (3) "to date, Lexecon has paid Plaintiffs Litigation Group more than $700,000 as part of that settlement."

Defendants first maintain that the letter is not actionable because it is true. As to the first matter, relating to the characterization of Judge Bilby's published opinion, the Court finds otherwise. *In re American Continental Corp./ Lincoln S&L Sec. Lit.*, 794 F. Supp. 1424, 1448-49 (D. Ariz. 1992), Judge Bilby detailed the *allegations* against

Lexecon. Judge Bilby held that a rational finder of fact could find that Lexecon possessed reckless scienter in its performance of certain services on behalf of Charles Keating, Jr., and therefore denied Lexecon's motion for summary judgment. Defendants contend that because the readership of the *National Law Journal* is primarily composed of lawyers and the Roddy letter refers to the order being issued in the context of denial of a motion for summary judgment, readers of the article must have understood that Judge Bilby's order merely stated that sufficient evidence of Lexecon's misconduct existed to preclude summary judgment. The Roddy letter, however, does not accurately report what Judge Bilby's order stated. The letter attempts to enhance Milberg Weiss' allegations by recasting those allegations as the conclusions reached by Judge Bilby. Plaintiffs contend that Roddy's statement was defamatory per se. Illinois law recognizes two kinds of defamation: defamation per se and defamation per quod. *Kolegas v. Heftel Broadcasting Corp.*, 154 Ill. 2d 221, 607 N.E.2d 201 (1992). Defamation per se encompasses those statements whose defamatory character is apparent on its face; defamation per quod categorizes those statements which require extrinsic facts in order to explain their defamatory meaning. *Id.*, 607 N.E.2d at 206.

There are four categories of statements under Illinois law that are considered defamatory per se: (1) words which impute the commission of a criminal offense; (2) words that impute infection with a loathsome communicable disease; (3) words that impute an inability to perform or want of integrity in the discharge of duties of office or employment; or (4) words that prejudice a party, or impute lack of ability in his or her trade, profession or business. *Id.* Roddy's letter's reference to Judge Bilby's order is within categories (3) and (4).

Nevertheless, even if a statement falls into one of the four per se categories, it will not be found to be defamatory per se if it is reasonably capable of an innocent construction. *Id.* Milberg Weiss argues that Illinois' innocent construction rule applies to this statement. This rule requires the Court to consider the statement in context, giving the words their ordinary meaning. If the statement may reasonably be innocently construed, it will not be regarded as defamatory per se. *Id.* Milberg Weiss contends that Roddy's letter is capable of being innocently construed, relying upon *Owen v. Carr.*, 113 Ill. 2d 372, 497 N.E. 1145 (1986).

Milberg Weiss' reliance on *Owen* is misplaced. In that case, the Illinois Supreme Court examined another *National Law Journal* article in its entirety and concluded that the defendant attorney's comments were capable of being construed as "an attorney's biased presentation of his client's view of a pending cause of action." *Id.*, 497 N.E.2d at 1148. In contrast, Roddy depicted his letter as a factual recitation. His letter stated:

> For those readers who are interested in *facts*, however, let me point out the following:
>
> . . . .
>
> Lexecon's motion for summary judgment also was denied by Judge Richard M. Bilby, in a published opinion that details its wrongful activities on behalf of convicted felon Charles H. Keating, Jr.'s American Continental Corp. and Lincoln Savings & Loan in fraudulent dealings with federal regulators. *In re American Continental Corp./Lincoln Savings & Loan Securities Litigation*, 794 F.Supp. 1424, 1443-49 (D. Ariz. 1992).

(Emphasis in original). Nor, contrary to defense counsel's suggestion, does Roddy's citation to Judge Bilby's opinion significantly mitigate the inaccurate nature of his statement. If anything, inclusion of the citation was likely to be viewed by readers as authoritative proof that the proceedings unfolded as Roddy described.

Milberg Weiss also suggests that Roddy's letter falls within the "self defense" privilege of Illinois common law. *See, e.g.*, Restatement (Second) of Torts § 594, comment e. However, as the initial article was neither defamatory nor solicited by Lexecon, this privilege does not attach.

Defendants' last argument is that Roddy's summary of Judge Bilby's order is privileged because it was a fair abridgement of judicial proceedings. But, as the Court has already found, Roddy's letter was not an accurate summary. Accordingly, this privilege also does not apply.

Milberg Weiss defendants also seek summary judgment as to the remaining two statements in the Roddy letter. These statements concern the assertion that Lexecon entered a "settlement" and "to date, Lexecon has paid . . . more than $700,000 . . . ."

Plaintiffs contend that the letter falsely stated that "Lexecon settled with plaintiffs." Dismissal of the class's claims against Lexecon occurred following negotiations between Lexecon counsel and counsel for the class. The dismissal was termed a "resolution" rather than a settlement. The resolution required Lexecon to provide substantial services. Roddy's characterization of the resolution as a settlement was not false.[8]

The resolution obligated Lexecon to perform certain services. Lexecon did not perform these services; rather, owing to a dispute with class counsel, it paid to the class an amount equal to the professional fees it earned from Keating. This amount exceeded $700,000. Accordingly, the Roddy letter was also not false in its suggestion that

[8] The Court has previously ruled that Judge Bilby's December 31, 1992 order would be given preclusive effect. In that order, Judge Bilby held that the resolution which effected Lexecon's dismissal was a bargained-for exchange, with consideration flowing both ways.

in settling with the class, Lexecon "to date" had "paid . . . more than $700,000." [9]

Milberg Weiss defendants' motion for summary judgment is denied as to the Roddy letter's summary of Judge Bilby's published opinion and is granted in all other respects.

Tortious Interference and Commercial Disparagement Claims

The previous Order dismissed all remaining defamation claims. However, the conduct that was the basis for those dismissed claims is also the conduct upon which plaintiffs base their tortious interference and commercial disparagement claims.

Facts

The acts that form the basis of plaintiffs' tortious interference and commercial disparagement claims are as follows:

(1) The statment of Milberg Weiss attorney Patrick Coughlin, which appeared in the March 15, 1991 issue of *The Recorder*, a San Francisco-area legal newspaper, that Fischel made the "biggest mistake any guy made in the country";

(2) Milberg Weiss attorney William Lerach's statement at a securities litigation seminar in northern California on July 23, 1991, that Fischel gave Charles Keating, Jr. a "clean bill of health";

(3) Milberg Weiss attorney Patricia Hynes' statement to opposing counsel on a recess after a hearing in district court in Chicago that Lexecon carried "too much baggage" to be an effective expert witness for opposing counsel;

[9] While no one expected Lexecon to pay additional money, Roddy's reference "to date" was at most an inartful way of stating that Lexecon had met its obligations under the terms of the resolution.

(4) Statements concerning Lexecon made by Milberg Weiss attorneys in briefs and in Court during the *Apple Computer* litigation, including Coughlin's statement in court that "we actually think [Fischel's] a crook;"

(5) Statements made by Milberg Weiss attorneys during the *Lincoln Savings* litigation, including the contents of the proposed Fifth Amended Complaint in which Lexecon and Fischel were named as defendants, which prompted Arthur Young to terminate its relationship with Lexecon;

(6) Milberg Weiss attorney Leonard Simon's statement to Sidney Davidson after Judge Bilby denied the motion to file the Fifth Amended Complaint, concerning class counsel's intent to sue Fischel and Lexecon again;

(7) Milberg Weiss' alleged attempt to "extort" testimony from Lexecon in exchange for dismissal from the *Lincoln Savings* litigation;

(8) Milberg Weiss attorney Kevin Roddy's statement to an FDIC lawyer that Lexecon, in *Lincoln Savings*, blamed the government for the collapse of that savings and loan; and,

(9) Dissemination of the proposed Sixth Amended Complaint on December 14, 1990.[10]

Discussion

Illinois law recognizes a litigation privilege which accords litigants an absolute privilege with respect to certain communications. *Zanders v. Jones*, 680 F. Supp. 1236 (N.D. Ill. 1988); *Skopp v. First Federal Savings of Wil-*

[10] Plaintiffs also point to other statements made by Milberg Weiss attorneys, including Melvyn Weiss' threat to Fischel to "destroy" him and Eric Isaacson's letter to co-counsel in which he refers to Fischel in derogatory terms. While plaintiffs do not contend that these statements are actionable in themselves, plaintiffs point to them as additional evidence of Milberg Weiss' personal animosity towards plaintiffs.

mette, 189 Ill. App. 3d 440, 545 N.E.2d 356 (1st Dist. 1989); *Libco Corp. v. Adams*, 100 Ill. App. 3d 314, 426 N.E.2d 1130 (1st Dist. 1981). The only qualification to this privilege is that the communication pertain to litigation. *Skopp*, 545 N.E.2d at 361. Under these cases, "anything said or written in the course of a legal proceeding is protected by an absolute privilege." *Zanders*, 680 F. Supp. at 1238. Furthermore, the communication need not occur in court. For instance, in *Zanders*, a telephone conversation between opposing counsel was conceded to fall within the rule, and in *Libco*, a communication between two attorneys suing the same defendant was found to be priveleged. The rationale for the privilege is to secure for attorneys as officers of the court the utmost freedom in representing clients. *Libco*, 426 N.E.2d at 1132 (citing Restatement (Second) of Torts § 586, Comment a). All doubts are to be resolved in favor of finding that the privilege applies. *Skopp*, 545 N.E.2d at 36. Applying this law to the facts presented, statements (3), (4), (5), (6), (7) and (8) are privileged.[11] Accordingly, these statements cannot form the basis for any tort.[12]

Statements (1) and (2) are clearly expressions of opinion. Opinion statements are not actionable as defamation. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19 (1990).[13]

[11] Plaintiffs argue that the privilege should be limited to situations in which attorneys are acting as advocates on behalf of their clients, so that "gratuitous" remarks in the course of otherwise protected conversations would be actionable. This position is not supported in Illinois law.

[12] Additionally, statements (6) and (8) are not actionable as tortious interference because they are substantially true. *George A. Fuller Co. v. Chicago College of Osteopathic Medicine*, 719 F.2d 1326, 1332 n.4 (7th Cir. 1983) (citing Restatement (Second) of Torts § 772(a)).

[13] Milberg Weiss asserts that opinion statements are "constitutionally privileged," and that once a privilege attaches to a state-

Opinions are also not actionable as commercial disparagement.[14] Lexecon maintains, however, that opinions may be actionable under a theory of tortious interference, citing *Chaves v. Johnson,* 230 Va. 112, 335 S.E.2d 97 (1985). However, the continuing viability of *Chaves'* holding is highly questionable in light of *Hustler Magazine, Inc. v. Falwell,* 485 U.S. 46 (1988). Furthermore, in *Unelko Corp. v. Rooney,* 912 F.2d 1049, 1057-1058 (9th Cir. 1990), the Ninth Circuit stated that claims for tortious interference and commercial disparagement "are subject to the same first amendment requirements that govern actions for defamation." Therefore, under the rationale of *Falwell* and *Unelko,* statements (1) and (2) are not actionable as either tortious interference or commercial disparagement.

In addition, plaintiffs inability to disaggregate damages is fatal to these claims. Plaintiffs' only damages expert, plaintiff Daniel Fischel himself, has testified at his deposition that he is unable to apportion plaintiffs' losses among the several acts which are claimed to be tortious. The Ninth Circuit has held that summary judgment is proper when a plaintiff has not or cannot disaggregate damages caused by actionable events from those caused by non-actionable events. *City of Vernon v. Southern Cal. Edison Co.,* 955 F.2d 1361, 1372-73 (9th Cir. 1992).

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ment, it is not actionable under any tort theory. *Genelco, Inc. v. Bowers,* 181 Ill. App. 3d 1, 536 N.E.2d 783 (1st Dist. 1989). However, the Supreme Court has explicitly held that opinions are not constitutionally privileged. *Milkovich,* 497 U.S. at 21. The reason opinions are not actionable as defamation is that it is impossible to prove their falsity, a necessary element of defamation. *Id.* 497 U.S. at 20.

[illegible] Illinois statutory definition of commercial disparagement protects against "false or misleading misrepresentation[s] of *fact.*" 815 ILCS § 510/2(8) (emphasis added). Illinois common law commercial disparagement requires a plaintiff to show a *false* and demeaning statement regarding the quality of another's goods or services. *Appraisers Coalition v. Appraisal Institute,* 845 F. Supp. 592, 610 (N.D. Ill. 1994).

Fischel, during his deposition testimony, was unable to disaggregate damages attributable to defendants' various acts. The time for discovery has elapsed. Since plaintiffs cannot separate the damages resulting from statements (1) and (2) from damages resulting from the other statements which the Court has found to be privileged, plaintiffs may not recover any damages for them.

Finally, plaintiffs maintain that Roddy's dissemination of the proposed Sixth Amended Complaint could be the basis for an action under either a tortious interference or commercial disparagement theory. For the reasons previously set forth relating to Illinois' litigation privilege and plaintiffs' inability to disaggregate damages, the complaint cannot be the basis for these claims.

Defendant's Counterclaims

Plaintiffs have filed a motion to dismiss the Milberg Weiss defendants' counterclaims. These counterclaims consist of three contract-related counts, those being breach of contract, unjust enrichment, and promissory estoppel, and one count of fraud.

Milberg Weiss was class counsel in the *Lincoln Savings* securities litigation. The counterclaims are based upon assertions that Lexecon misled Milberg Weiss into accepting the "resolution," resulting in the dismissal of Lexecon. It is undisputed that Lexecon counsel stated that plaintiffs wanted the dismissal to be labelled a resolution in order to prevent future damaging cross-examination of Fischel concerning a settlement of the *Lincoln Savings* case. However, Milberg Weiss maintains Fischel also wanted the case termination to be labelled a resolution so that he would preserve the option of suing class counsel. Milberg Weiss argues that Lexecon was under a duty to disclose this second motive to them.[15]

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[15] Plaintiffs' lawsuit against Milberg Weiss cannot be said to be entirely unexpected in light of Lexecon's counsel's inquiry of class

Milberg Weiss defendants also argue that Lexecon misrepresented the existence of insurance coverage. This ground, however, is not alleged in the counterclaims.[16]

The counterclaims must be dismissed. All of the counterclaims assume that class counsel was a *party* to the resolution. The law is otherwise. Lawyers are agents of clients. *Barmat v. John and Jane Doe Partners A-D*, 155 Ariz. 515, 517, 747 P.2d 1214, 1216 (App. 1986) (citing Restatement (Second) of Agency § 1, comment e), *aff'd in relevant part*, 155 Ariz. 519, 747 P.2d 1218 (1986). An agent is not a party to a contract. Restatement (Second) of Agency § 320, comment b. Whatever harm resulting from the resolution was sustained by the class, not by class counsel. Therefore, defendants lack standing to pursue these claims. Plaintiffs' motion to dismiss the counterclaims is well taken.

Conclusion

For the foregoing reasons, IT IS HEREBY ORDERED that Milberg Weiss defendants' motions for summary judgment as to the defamation claim based upon dissemination of the Sixth Amended Complaint, the tortious interference claims, and the commercial disparagement claims ARE GRANTED.

IT IS FURTHER ORDERED that Milberg Weiss defendants' motion for summary judgment as to the Kevin

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counsel, during negotiations of the "resolution," as to whether it would be necessary for Lexecon to give up any right Lexecon might have to file future lawsuits against class counsel. Class counsel stated that forbearance of any future actions was unnecessary.

[16] Lexecon had insurance proceeds in the amount of approximately $2 million at the time the resolution was entered, which reflected a favorable settlement Lexecon achieved with its insurance carrier to partially reimburse its litigation expenses. Lexecon counsel had previously indicated that no insurance existed. Lexecon maintains that it's insurance policies were produced and deposited in MDL 834 document depository and so were available for inspection by defendants.

Roddy letter to the *National Law Journal* IS GRANTED IN PART AND DENIED IN PART.

IT IS FURTHER ORDERED that the Cotchett, Illston and Pitre defendants' motion for summary judgment IS GRANTED.

IT IS FURTHER ORDERED that plaintiffs' motion to dismiss defendants' counterclaims IS GRANTED.

By separate Order, the Court will address the venue issue.

Dated this 20th day of April, 1995.

/s/ John M. Roll
JOHN M. ROLL
United States District Judge

APPENDIX F

[Filed Nov. 29, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MDL Docket No. 834
No. CIV 93-1087 PHX JMR

IN RE AMERICAN CONTINENTAL CORPORATION/LINCOLN SAVINGS & LOAN SECURITIES LITIGATION.

LEXECON INC. and DANIEL R. FISCHEL,
Plaintiffs,

v.

MILBERG WEISS BERSHAD HYNES & LERACH, a partnership; COTCHETT, ILLSTON & PITRE, a partnership; GREENFIELD & CHIMICLES, a partnership; and PATRICK COUGHLIN, BLAKE HARPER, WILLIAM S. LERACH, KEVIN P. RODDY, LEONARD SIMON, MELVYN I. WEISS, JARED SPECTHRIE, PATRICIA HYNES, MICHAEL C. SPENCER, STEPHEN STEINBERG, JOSEPH COTCHETT, and SUSAN ILLSTON, individually,
Defendants.

ORDER

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Lexecon is an economic consulting firm, some of whose employees, including Plaintiff Daniel Fischel, testify frequently as experts on certain economic issues.

Fischel is a tenured professor at the University of Chicago Law School.[1] Defendants Milberg Weiss Bershad Hynes & Lerach, Cotchett, Illston & Pitre, and Greenfield & Chimicles are law firms that specialize in securities class action litigation.[2] As such, they were co-counsel for class plaintiffs, in *Shields v. Keating, et al,* MDL No. 834, a multi-district case litigated in the district of Arizona.

Shields was a class action brought on behalf of purchasers of securities issued by Keating's company, American Continental Corporation ("ACC" or "ACC/Lincoln"). The class sought over $360 million in pretrebled damages and unspecified punitive damages against a variety of defendants claiming that they had conspired to violate securities and racketeering laws by misleading investors with respect to the safety of ACC securities. In September 1989, the accounting firm of Arthur Young & Co., one of the *Shields* defendants, retained Lexecon and Fischel as experts to assist in preparing its defense.[3]

In March 1990, defendants (as class counsel) sought leave to file a fifth amended complaint in order to add both Lexecon and Fischel as parties. Defendants based the class claim against Lexecon and Fischel on certain reports prepared by that organization on behalf of ACC/Lincoln for submission to federal regulators. The pro-

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[1] Plaintiffs will be referred to in the singular as "Lexecon" throughout the text.

[2] Defendants break into several distinct groups. In addition to the firm, the Milberg Weiss defendants refers to active partners Patrick Coughlin, Blake Harper, William S. Lerach, Kevin P. Roddy, Leonard B. Simon, Melvyn I. Weiss, Patricia Hynes, Michael S. Spencer and former partners Stephen Steinberg and Jared Specthrie. The Cotchett, Illston & Pitre defendants include the firm and its partners Joseph Cotchett and Susan Illston. The Greenfield & Chimicles defendant refers exclusively to the firm.

[3] Prior to the attempted amendment, Lexecon had been retained by *Shields* defendant Arthur Young & Co. as an expert. Lexecon's services were thereafter terminated.

posed Fifth Amended Complaint alleged that Lexecon and Fischel had learned the "true" nature of ACC/Lincoln's business practices, but nevertheless assisted the thrift in its efforts to keep regulators at bay while it continued to sell worthless debentures. The motion for leave to file an amended complaint was denied in May of 1990.

Approximately six months after this ruling, defendants renewed their efforts to bring Lexecon into the *Shields* litigation. Defendants created a purported "Sixth Amended Complaint" naming Lexecon and Fischel as defendants. This document was circulated to dozens of Lexecon's potential clients—individual lawyers, law firms, and corporations—not all of whom were prospective parties to the complaint.[4] This pleading was never filed. A few days later, however, a different version of the proposed "Sixth Amended Complaint" was filed, this time deleting Fischel as a named defendant.[5] On January 30, 1991, leave to file was granted.

According to Lexecon, defendants' purpose behind involving Lexecon and Fischel in the *Shields* litigation was threefold: (1) to extract false testimony implicating other *Shields* defendants, (2) prevent Arthur Young & Co. from using Lexecon as an expert in *Shields*, and (3) "to make Lexecon in general and Fischel in particular far less attractive to potential clients as expert witnesses." Lexecon claims that defendants were making good on Melvyn Weiss's threat to "destroy" Fischel because of his testimony widely believed to have produced several big victories against clients represented by Milberg Weiss.

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[4] At oral argument, counsel for Milberg Weiss defended this action my stating that the complaint was only distributed to the service list and "the world is my service list . . . . [t]hey are all potential clients of Jenner, Block and Solovy, but the service list is the service list . . . ."

[5] Fischel does appear in the body of the complaint and is referred to as a defendant.

The *Shields* case went to trial in the summer of 1992. After all of the evidence was in following a four-month trial but before closing arguments, in what was termed a "resolution," Lexecon was dismissed from the case.[6] As part of the resolution, *Shields* defendant Touche Ross agreed to settle with the class for $7.5 million and to perform certain claims administration services. The claims services would be subcontracted to Lexecon. In exchange, the court would enter a voluntary dismissal without prejudice as to Lexecon. The parties agreed to execute a dismissal with prejudice to be held by the trial judge, the Honorable Richard M. Bilby, and made part of the record in the event it became necessary to show that all claims against Lexecon were barred.

After extended negotiations facilitated by Judge Bilby, the parties carefully crafted the resolution in such a way as to specifically avoid the appearance of settlement. Lexecon's counsel stated on the record that Lexecon decided to provide a benefit to the class because it was persuaded that its services may have been misused by ACC/Lincoln, but qualified its position by noting that Lexecon could not agree to provide its services as a quid pro quo for dismissal because settling would subject its experts to unfair cross-examination with respect to credibility and expertise.

The resolution fell apart shortly after having been entered into. Class counsel explained to Judge Bilby that they were concerned in retrospect that Lexecon was unable to perform the work. At this point, Lexecon had spent $123,000 for the first portion of the claims services. Class counsel suggested instead that a third party be retained at Lexecon's expense. Fischel responded by issuing a check to the class for $593,960, which, combined with the monies previously spent, represented the total

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[6] Lexecon's motions for summary judgment and directed verdict were denied.

amount Lexecon had earned from its work with ACC/Lincoln. In a letter accompanying the payment, Fischel stated that Lexecon had been improperly prevented from performing services for the class and that it had decided to benefit the class instead by returning its professional fees.

In November of 1992, Lexecon filed a complaint in the Northern District of Illinois alleging malicious prosecution, abuse of process, defamation, and other commercial disparagement torts. It is Lexecon's position that it had no choice but to sue due to defendants' improper collateral use of Lexecon's involvement in *Shields*. The case was thereafter referred to the multi-district litigation panel which determined that the matter was properly considered a part of the *American Continental Corporation/Lincoln Savings and Loan Litigation*. The case is now pending before this Court.

MOTIONS TO DISMISS

Defendants, upon individual and joint motion, seek dismissal of the amended complaint for failure to state a claim upon which relief can be granted. A complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) when, accepting all well-pleaded allegations of fact as true, and drawing all reasonable inferences in favor of the plaintiff, no relief could be granted under any set of facts that might be proved. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). "Where a claim involves the right to petition governmental bodies . . . we apply a heightened pleading standard." *Oregon Natural Resources Council v. Mohla*, 944 F.2d 531, 533 (9th Cir. 1991).

I.

MALICIOUS PROSECUTION

A. *Choice of Law.*

Count One of the Amended Complaint asserts a claim of malicious prosecution under Arizona law. Defendants argue that Illinois law governs the disposition of all counts of the amended complaint, including the malicious prosecution claim. A transferee court must follow the choice of law rules of the transferror court. *Ferens v. John Deere Co.*, 494 U.S. 516 (1990) (rule announced in context of a § 1404(a) transfer for "the convenience of parties and witnesses"). As a federal court exercising its diversity jurisdiction, the Illinois district court would have applied the substantive law of Illinois, including the Illinois choice of law rules. *Goldberg v. Medtronic, Inc.*, 686 F.2d 1219, 1225 (7th Cir. 1982). Illinois has adopted a "most significant relationship" test for determining the substantive law applicable in tort cases. *Ingersoll v. Klein*, 262 N.E.2d 593 (Ill. 1970).

In deciding which state has the most significant contacts, courts look to (1) the domicile of the parties; (2) the place where the injury occurred; (3) the place where the conduct causing the injury occurred; and (4) the place where the relationship, if any, between the parties is centered. *Miller v. Long-Airdox Co.*, 914 F.2d 976, 978 (7th Cir. 1990). "Illinois law presumes that the law of the state where the injury occurred will govern unless another state has a more significant relationship to the occurrence or to the parties involved." *Id.* (internal citations omitted). *See also Restatement (Second) of Conflicts of Laws* § 155 (1971) ("The rights and liabilities of the parties for malicious prosecution or abuse of process are determined by the local law of the state where the proceeding complained of occurred, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 . . . .").

To defeat the general presumption that Arizona has the greater interest, defendants claim that none of the parties is a citizen of Arizona,[7] the alleged injuries occurred in Illinois, and the parties' relationship is centered in Illinois. This is insufficient rebuttal, however. All defendants have really shown is that the parties have engaged in a nationwide practice and their contacts are vast. They have not shown that between Arizona and Illinois, Illinois has a greater interest in the outcome of this case. Because the *Shields* case was prosecuted in Arizona and particularly because the complaint against Lexecon was filed here, the malicious prosecution and abuse of process counts are governed by Arizona state law. *See Engel v. CBS Inc.*, 981 F.2d 1076 (9th Cir. 1992) (New York state's interests would be impaired if litigants practicing in New York federal court were not subject to New York's restrictive policy with respect to malicious prosecution actions).

B. *Elements of the Tort.*

To sustain a claim for malicious prosecution, the "[p]laintiff must prove defendant (1) instituted a civil action which was (2) motivated by malice, (3) begun without probable cause, (4) terminated in plaintiff's favor and (5) damaged plaintiff." *Bradshaw v. State Farm Mutual Auto Ins. Co.*, 157 Ariz. 411, 417, 758 P.2d 1313, 1319 (1988). Although defendants concede nothing, the only prongs seriously in contention are numbers three and four.[8]

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[7] The interest of the state where the plaintiff resides is not more significant than the state where the underlying litigation was prosecuted. *R.J.R. Services, Inc. v. Aetna Cas. & Surety Co.*, 895 F.2d 279, 282 n. 4 (7th Cir. 1989).

[8] Because the Court finds Lexecon has failed to sufficiently plead the probable cause requirement, Count One is deficient as a matter of law and the Court need not reach the favorable termination factor.

Under Arizona law, the test for whether probable cause exists is both subjective [9] and objective. *Id.* "The initiator of the action must honestly *believe* in its possible merits; and, in light of the facts, that *belief must be objectively reasonable.*" *Id.* (emphasis in original).

This formulation is no longer viable under recent Supreme Court authority. In *Professional Real Estate v. Columbia Pictures Industries*, 113 S.Ct. 1920, 1925 (1993), the Supreme Court addressed the issue of whether litigation that is "not significantly motivated by a genuine desire for judicial relief" can be a "sham" and actionable under the antitrust laws. The Court stated that "an objectively reasonable effort to litigate cannot be a sham regardless of subjective intent." *Id.* at 1926. In other words, as long as the underlying lawsuit is not objectively baseless, the plaintiff cannot be held liable for bringing the suit even if the plaintiff's motives were malicious. *Id.*

The *Professional Real Estate* decision is the most recent development in the ongoing evolution of the *Noerr-Pennington* doctrine. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). *Noerr-Pennington* shields efforts to influence legislative or executive action from liability under the antitrust laws, with the exception of those deeds "ostensibly directed toward influencing governmental action . . . [as]

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[9] Lexecon cites three occasions when lawyers from each of the defendant firms acknowledged the absence of merit in the complaint against Lexecon. The Amended Complaint alleges that Joseph Cotchett admitted to Lexecon's former attorney, Stephen C. Neal, that there was no basis for the claims against Lexecon and that the decision to sue was based on Milberg's animus. Further, the Amended Complaint states that Stephen Steinberg, a Milberg Weiss partner, related to Fischel that he believed it "wrong" to bring Lexecon into the suit. Third, a Greenfield & Chimicles partner suggested to Fischel that the lawsuit against Lexecon was the result of a vendetta on Milberg's part.

a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationship of a competitor." *Noerr*, 365 U.S. at 144. The protection has been extended to litigation and includes claims other than those brought under the antitrust laws. *California Motor Transp. v. Trucking Unlimited*, 404 U.S. 508 (1972); *Franchise Realty, Etc. v. S.F. Loc. Joint Executive*, 542 F.2d 1076 (1976), *cert. denied*, 430 U.S. 940 (1977). Indeed, "while the doctrine evolved in the context of anti-trust litigation . . . the doctrine has been applied to protect the First Amendment right to petition against claims of tortious interference with business relations." *Havoco of America, Ltd. v. Hollobow*, 702 F.2d 643, 649 (7th Cir. 1983) (citations omitted).

In *Professional Real Estate*, the Supreme Court articulated a two-part test to determine whether activity otherwise protected under *Noerr-Pennington* loses its immunity under the sham exception:

> First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objecive litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized . . . . Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals an attempt to interfere directly with the business relationships of a competitor through the use of the governmental process—as opposed to the outcome of that process—as an anti-competitive weapon.

Professional Real Estate, 113 S.Ct. at 1922.

Defendants argue that *Professional Real Estate* renders the subjective branch of the *Bradshaw* probable cause test unconstitutional. Lexecon responds by claiming that

Noerr-Pennington is essentially a principle of statutory construction and that *Professional Real Estate* does not constrict the permissible limits of common law torts. The Ninth Circuit in *Oregon Natural Resources* held that when probable cause exists for the filing of the underlying suit, the *Noerr-Pennington* doctrine bars all types of state law claims challenging that suit, specifically referring to abuse of process and tortious interference claims. *Oregon Natural Resources Counsel v. Mohla*, 944 F.2d 531, 532-34 (9th Cir. 1991). Subjective intent is only relevant if the objective prong is satisfied.

To survive the motion to dismiss, therefore, Lexecon must show that the *Shields* litigation was objectively baseless and this it cannot do. Although the Court does not find as defendants would have it that the related doctrines of law of the case and collateral estoppel ordain this result, the Court has independently concluded that no reasonable person could find that the Sixth Amended Complaint lacked objective probable cause.[10] The record before this Court as recited in the *Shields* rulings is highly persuasive evidence that the case against Lexecon meets the probable cause threshold.

II.

ABUSE OF PROCESS

Liability for abuse of process occurs when "[o]ne . . . uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed . . . ." *Restatement (Second) of Torts*

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[10] *See Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1198 (9th Cir. 1988) (court considering a Rule 12(b)(6) motion properly may look beyond the complaint to items in the record of the case, or to matters of general public record); *Mack v. South Bay Beer Distrib., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986) (a motion to dismiss was not converted to a motion for summary judgment when court looked beyond the pleadings to matters of public record).

§ 682 (1977). "The essential elements of the tort include a wilful act in the use of judicial process for an ulterior purpose not proper in the regular conduct of the proceedings." *Morn v. City of Phoenix*, 152 Ariz. 164, 166, 730 P.2d 873, 875 (App. 1986). "Abuse of process . . . is not commencing an action or causing process to issue without justification," *Prosser & Keeton On Torts* § 121 at 897 (5th ed. 1984), but requires an overt act other than the initiation of a lawsuit to effect the illegitimate end. *Joseph v. Markovitz*, 27 Ariz. App. 122, 551 P.2d 873 (App. 1976). "It is the subsequent misuse which constitutes the misconduct for which liability is imposed." *Nienstedt v. Wetzel*, 133 Ariz. 348, 353, 651 P.2d 876 (App. 1982). Without more, an abuse of process claim will not lie even when process was issued without justification. *Morn*, 152 Ariz. at 167, 730 P.2d at 874.

Defendants first argue that Lexecon's abuse of process claim is duplicative of the malicious prosecution count. Although closely related to malicious prosecution, the tort of abuse of process serves to protect different interests.[11] As the leading authority explains:

> The action for malicious prosecution, whether it be permitted for criminal or civil proceedings, has failed to provide a remedy for a group of cases in which legal procedure has been set in motion in proper form, with probable cause, and even with ultimate success, but nevertheless has been perverted to accomplish an ulterior purpose for which it was not designed. In such cases, a tort action has been developed for what is called abuse of process.

Prosser and Keeton, § 121 at 897. Notwithstanding the different purposes served by the two torts, defendants are correct that something more than filing the complaint is required for Lexecon to make a prima facie showing.

[11] Assuring continued access to the courts is an important consideration limiting *liability*. 1 F.V. Harper, F.J. James & O.S. Grey, *The Law of Torts*, § 4.9 (2d ed. 1985).

Lexecon's additional allegations involve defendants' purported request for Lexecon to implicate others involved with American Continental and the subsequent collateral use of the *Shields* complaint for impeachment purposes in unrelated litigation. First, pre-process activities do not satisfy the pleading requirement.[12] The "threat of suit cannot constitute a 'wilful act' for the tort," *Blue Goose Growers, Inc. v. Yuma Groves, Inc.*, 641 F.2d 695, 697 (9th Cir. 1981), because "an actual use of the suit" is required. *Joseph*, 27 Ariz. App. at 126. Lexecon does not dispute this general principle only its application here asserting that defendant's wilful acts occurred after process was invoked.

Under Arizona law, the term process "has been interpreted broadly, and encompasses the entire range of procedures incident to the litigation process." *Nienstedt*, 133 Ariz. at 352, 651 P.2d at 880 (abuse of process principles apply to case where ulterior purpose was to expose injured party to attorneys' fees and costs). The *Nienstedt* court enumerated the following as examples of process: "the noticing of depositions, the entry of defaults, and the utilization of various motions such as motions to compel production, for protective orders, for change of judge, for sanctions and for continuances." *Nienstedt*, 133 Ariz. at 352-53, 651 P.2d at 880-81. Even under *Nienstedt*'s liberal definition, however, the filing of the motion for leave to file the Fifth Amended Complaint does not constitute process. The motion was denied and summons did not issue.

Lexecon additionally claims that post-process misconduct occurred through defendants' collateral use of the *Shield*'s complaint for impeachment purposes in other

[12] Class plaintiff's "Motion to File Fifth Amended Complaint" was filed with the court in March of 1990. Defendants' alleged extortion attempt whereby they would withdraw the complaint in exchange for damaging testimony by Lexecon against other *Shields* defendants occurred the following month.

litigation.[13] *Prosser & Keeton* equates special advantage with extortion. *Prosser & Keeton*, § 121 at 898. Defendants' actions in this regard do not constitute the impermissible "special advantage" necessary to support the tort. Accordingly, Count Two must also be dismissed.

III.

INTENTIONAL INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE

Illinois common law tortious interference with prospective economic advantage requires: (1) a reasonable expectation on the plaintiff's part of entering into a valid business relationship; (2) purposeful interference and defeat of plaintiff's legitimate expectancy by defendant; and (3) damage. *Philip I. Mappa Interests Ltd. v. Kendle*, 544 N.E.2d 1008, 1011 (Ill. App. 1990). In those cases in which the defendant acted with a qualified privilege or justification, the plaintiff bears the additional burden of pleading actual malice. *Id.* "Bare allegations of actual malice, unsupported by facts, are not sufficient to negate the protections of privilege or justified conduct." *Id.* It is critical to note, however, that the claim must be based on more than the alleged wrongful filing of a lawsuit. *Havoco*, 702 F.2d at 647.

The well-pleaded facts in support of Count Three are as follows. Defendants' interference with Lexecon's expectations began with the publication of the purported Sixth Amended Complaint to Lexecon's clients and prospective clients. Defendants made other public and private statements at a press conference and at a seminar impugning Lexicon's ability and integrity. Defendants discouraged their colleagues from retaining Lexecon and interfered with

[13] In an order dated December 31, 1992, Judge Bilby held that the allegedly improper cross-examination of Lexecon experts was "in accordance with the agreement reached with Lexecon in MDL 834 in every respect."

Lexecon's business arrangements with Professor Sidney Davidson. Malice, Lexecon claims, is present through its allegations that defendants jointly and severally conspired to destroy Lexecon and Fischel.

Defendants again rely upon the *Noerr-Pennington* doctrine and allege that they are immune from liability. However, the predicate acts for liability for this count are not based on the filing of the *Shields* lawsuit but upon the dissemination of the purported Sixth Amended Complaint that was never filed and substantively redacted prior to actual filing. The Court does not even reach the *Noerr-Pennington* analysis on these facts.

Count Three properly states a claim for relief and will not be dismissed.

IV.

DEFAMATION

Count Four of Lexecon's amended complaint alleges a cause of action for defamation and libel. Lexecon describes five specific circumstances when defendants made false and defamatory statements: (1) circulation of the proposed Sixth Amended Complaint, (2) statements made by defendant Patrick Coughlin of Milberg Weiss to the press that plaintiff Fischel had made the "biggest mistake any guy made in the country" in supposedly reaching the conclusion that Lincoln Savings was safe,[14] (3) statements by defendant Lerach of Milberg Weiss at a seminar maintaining that Fischel had given Charles Keating a "clean bill of health," (4) continuing statements made to Lexecon's prospective clients that Lexecon "carried too much baggage to be effective expert

[14] In the reports prepared at the behest of ACC/Lincoln Savings, Lexecon opined that "Lincoln is sound" and is "safer" than other comparable thrift institutions. *In re American Continental Corp./Lincoln S & L Sec. Litig.*, 794 F. Supp. 1424, 1448 (D. Ariz. 1992).

witnesses," (5) a letter authored by defendant Kevin Roddy of December 14, 1992 to the *National Law Journal* stating that Lexecon "settled" the *Shields* case and had paid $700,000 "to date." The letter further stated that Lexecon was guilty of "wrongful activities on behalf of" a convicted felon and "fraudulent dealings with regulators" and suggested that Judge Bilby found Lexecon guilty of the allegations.

To make out a claim for defamation, the plaintiff must set forth sufficient facts to show that the defendant made a false statement concerning plaintiff, that there was an unprivileged publication to a third party with fault by the defendant, and that the publication caused damage to the plaintiff. *Krasinski v. United Parcel Service, Inc.*, 530 N.E.2d 468, 471 (Ill. 1988); *Restatement (Second) of Torts* § 558 (1977). A statement is considered to be defamatory if it "tends to cause such harm to the reputation of another that it lowers that person in the eyes of the community or deters third persons from associating with [that person]." *Homerin v. Mid-Illinois Newspapers*, 614 N.E.2d 496, 497 (Ill. App. 1993).

Lexecon claims that defendants' statements are defamatory per se. Defamation per se occurs when the defamatory character is apparent on the face of the statements, and includes those "words that prejudice a party, or impute lack of ability in [that person's] trade, profession or business." *Kolegas v. Heftel Broadcasting Corp.*, 607 N.E.2d 201, 206 (Ill. 1992). Per se statements are so obvious and materially harmful to the plaintiff that injury to the plaintiff's reputation may be presumed. *Id.*

The Court finds that the only allegations which can survive defendant's motions to dismiss are those based upon the distribution of the proposed Sixth Amended Complaint and the Roddy letter. The other predicate

acts are not factual assertions and, for the following reasons, are entitled to constitutional protection.[15]

The Supreme Court has held that statements that do not contain factual assertions are protected under the First Amendment and may not be the basis of a defamation action. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19 (1990). The test to determine whether a defamatory statement is constitutionally protected is a restrictive one; only those statements that "cannot 'reasonably [be] interpreted as stating actual facts' " are entitled to protection. *Id.* at 20 (quoting *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988)). Defendants describe their statements as "no more than a lawyer's 'expression of [his] opinion regarding his client's allegations against' Lexecon, as anyone reading or hearing the statements would have understood." The Court agrees.

V.

COMMERCIAL DISPARAGEMENT

Defendants strongly contend that the Illinois common law cause of action for commercial disparagement has been preempted in its entirety by the enactment of the

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[15] The Court rejects defendants argument that their statements made in reference to Lexecon are absolutely shielded as comments made in the course of a judicial proceeding. *Skopp v. First Fed. Savings*, 545 N.E.2d 356, 360 (Ill. App. 1989) ("An absolute privilege protects anything said or written in a legal proceeding" as long as the "communication pertains to the litigation."). The privilege is not as broad as defendants maintain. For instance, the communication must be "pertinent and material" and be aimed at individuals with a direct connection to the proceedings. *See Kleier Advertising, Inc. v. Premier Pontiac, Inc.*, 921 F.2d 1036, 1043 (10th Cir. 1990). Statements made to the media have been rejected as covered by the privilege. *See Green Acres Trust v. London*, 141 Ariz. 609, 688 P.2d 617, 622-23 (1984). In an analogous matter, the Supreme Court recently ruled that a prosecuting attorney's allegedly false statements made during a press conference were entitled to only qualified immunity from section 1983 liability. *Buckley v. Fitzsimmons*, 113 S.Ct. 2606, 2618 (1993).

state Deceptive Trade Practices Act.[16] *National Educational Advertising v. Cass Student Advertising, Inc.*, 454 F. Supp. 71, 73 (N.D. Ill. 1977). The Act prohibits "false or misleading misrepresentation[s] of fact disparage the goods, services or business of another." 815 ILCS § 510/2(8); *Maytag Co. v. Meadows Mfg. Co.*, 35 F.2d 403 (7th Cir. 1929) (disparagement by competitors subject to injunction), *cert. denied*, 281 U.S. 737 (1930). The Act does not, in fact, preempt the common law tort; rather, its intent is to supplement the available remedies. *See* 815 ILCS § 510/3 ("The relief provided in this Section is in addition to remedies otherwise available against the same conduct under the common law."). In discussing the Act, one court noted that it was not intended to be a consumer protection statute, but, rather, was meant to prohibit unfair competition. As such, the Act does not provide a cause of action for damages, but does authorize a private suit for injunctive relief. *Disc Jockey Referral Network, Ltd. v. Ameritech Pub. of Illinois*, 596 N.E.2d 4 (Ill. App.), *appeal denied*, 602 N.E.2d 450 (Ill. 1992).

Although conflicting case law abounds, most courts to consider the issue have concluded that a common law cause of action for *damages* does exist. *See Genelco, Inc. v. Bowers*, 536 N.E.2d 783 (Ill. App.), *appeal denied*, 545 N.E.2d 109 (Ill. 1989); *Crinkley v. Dow Jones & Co.*, 385 N.E.2d 714, 719 (Ill. App. 1978) (strongly suggesting that Illinois recognizes the common law tort despite enactment of Deceptive Trade Practices Act). *But see Magid Mfg. v. U.S.D. Corp.*, 654 F. Supp. 325, 333 (N.D. Ill. 1987) ("In Illinois, however, there is no common law cause of action for commercial disparagement.").

In light of the specific savings clause included in the Illinois statute, Lexecon's position is correct.

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[16] The common law tort of commercial disparagement applies to those statements which demean the quality of one's goods or services.

VI.

COMMERCIAL DISPARAGEMENT UNDER THE ILLINOIS ACT

In Count Six, Lexecon seeks relief pursuant to the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS § 505 *et seq.* The Act prohibits unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce. 815 ILCS § 505/2. The Act is to be "liberally construed to effect the purposes thereof." 815 ILCS § 505/11a.

Defendants first claim a First Amendment privilege relying upon the arguments discussed above. *See Skopp v. First Fed. Sav.*, 545 N.E.2d 356, 360 (Ill. App. 1989). Although the privilege may cover the statements made during the collateral litigation, it does not protect defendants from liability created from distribution of the proposed Sixth Amended Complaint.

Second, defendants maintain that Lexecon does not state a claim because it lacks standing to pursue a suit under the Act. Defendants claim that Lexecon is not a "consumer" in that it neither purchased or contracted for goods or services from the defendants nor alleged any effect on competition or consumer protection concerns. Standing, however, is given to all persons. 815 ILCS § 505/10(a). Persons are defined to include partnerships, corporations, companies, and business entities and associations. 815 ILCS § 505/1(c); *Scott v. Cardet International, Inc.*, 321 N.E.2d 386, 392 (Ill. App. 1974) (holding that a 1973 amendment to the Act extended protection to businesspersons). However, "liability under the Consumer Fraud Act [is limited] to conduct that implicates consumer protection concerns." *Hill v. Names & Addresses, Inc.*, 571 N.E.2d 1085, 1101 (Ill. App. 1991).

"[W]here the dispute involves two businesses who are not consumers, the proper test is . . . whether the alleged conduct involves trade practices addressed to the market generally or otherwise implicates consumer protection concerns." *Downers Grove Volkswagen, Inc. v. Wigglesworth Imports, Inc.*, 546 N.E.2d 33, 41 (App. 1989). As a non-consumer business, Lexecon must allege a violation causing at least an indirect consumer effect. *Jays Foods, Inc. v. Frito-Lay, Inc.*, 664 F. Supp. 364, 368-69 (N.D. Ill. 1987).

In support of this court, Lexecon states that "[t]he amended complaint alleges that defendants falsely disparaged plaintiffs' services in order to 'destroy' a formidable and successful adversary in litigation. The resulting loss of business not only injured plaintiffs, but also consumers who were improperly dissuaded from using Lexecon's services." This sufficiently alleges a detrimental effect on Lexecon's ability to compete in the marketplace.

Third, defendants argue that even if Lexecon has standing to sue, the practice of law is immune from a Consumer Fraud Act violation. *Guess v. Brophy*, 517 N.E.2d 693, 696 (Ill. App. 1987), *appeal denied*, 526 N.E.2d 830 (Ill. 1988). This rule prevents the bringing of a malpractice claim pursuant to the statute; it does not, however, protect those engaged in the business of law. *Gadson v. Newman*, 807 F. Supp. 1412 (C.D. Ill. 1992). Accepting Lexecon's pleadings as true as the Court must, Lexecon states a claim pursuant to the Act.

CONCLUSION

IT IS HEREBY ORDERED that Defendants' joint and individual motions to dismiss are GRANTED IN PART and Count One and Count Two of Plaintiffs' Amended Complaint are DISMISSED. Defendants' joint and individual motions to dismiss Count Four are GRANTED IN PART as set forth above. In all other

respects, Defendants' joint and individual motions are DENIED.

Dated November 22, 1993

/s/ John M. Roll
JOHN M. ROLL
United States District Judge

APPENDIX G

June 3, 1993

Docket No. 834

BEFORE THE JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION

IN RE AMERICAN CONTINENTAL CORPORATION/LINCOLN SAVINGS AND LOAN SECURITIES LITIGATION

N.D. Illiois, C.A. No. 1:92-CV-7768

LEXECON, INC. *et al.*

v.

MILBERG WEISS BERSHAD SPECTHRIE & LERACH, *et al.*,

Before JOHN F. NANGLE, Chairman, MILTON POLLACK, ROBERT R. MERHIGE, JR., WILLIAM B. ENRIGHT, CLARENCE A. BRIMMER, JR., JOHN F. GRADY, and BAREFOOT SANDERS, Judges of the Panel

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TRANSFER ORDER

Before the Panel is a motion by the Milberg Weiss Bershad Specthrie & Lerach defendants in the above-captioned action (*Lexecon*) to transfer, pursuant to 28 U.S.C. § 1407, *Lexecon* to the District of Arizona for coordinated or consolidated pretrial proceedings with the previously centralized actions in this docket. All *Lexecon* defendants join in the motion. The *Lexecon* plaintiffs oppose transfer.

On the basis of the papers filed and the hearing held, the Panel finds that *Lexecon* shares common questions of fact with previously centralized actions in MDL-834 and that transfer of this action to the District of Arizona will best serve the convenience of the parties and witnesses and

promote the just and efficient conduct of this litigation. Specifically, these actions share questions of fact with an as yet unapproved settlement involving Touche Ross, Lexecon, Inc. and the investor plaintiffs in the Lincoln Savings investor class actions in MDL-834. Centralization under Section 1407 is thus desirable in order to prevent inconsistent pretrial and appellate rulings, avoid duplication of discovery, and conserve the resources of the parties, their counsel and the judiciary.

Although most litigations centralized under Section 1407 are under the supervision of one transferee judge, there have been instances where the Panel has assigned another transferee judge to handle one or more actions in particular litigation. *See Washington Public Utilities Group v. United States District Court*, 843 F.2d 319 (9th Cir. 1987); *Hale v. Firestone Tire & Rubber Co.*, 756 F.2d 1322 (8th Cir. 1985); *In re Department of Energy Stripper Well Exemption Litigation*, 472 F.Supp. 1282 (J.P.M.L. 1979); *In re Sugar Industry Antitrust Litigation*, 395 F.Supp. 1271 (J.P.M.L. 1975), 427 F.Supp. 1018 (J.P.M.L. 1977), MDL-201/201A (J.P.M.L. May 5, 1978) (unpublished order) and 471 F.Supp. 1089 (J.P.M.L. 1979). In light of the presiding MDL-834 transferee judge's recusal in *Lexecon*, we transfer this action for coordinated or consolidated pretrial proceedings with the previously centralized MDL-834 actions to a second transferee judge in the District of Arizona. We note that i) a massive document depository is located in the District of Arizona and ii) the Ninth Circuit has before it an appeal of an order in MDL-834 which may be relevant to the *Lexecon* claims.

IT IS THEREFORE ORDERED that, pursuant to 28 U.S.C. § 1407, *Lexecon, Inc., et al. v. Milberg Weiss Bershad Specthrie & Lerach, et al.*, N.D. Illinois, C.A. No. 1:92-CV-7768, be, and the same hereby is, transferred to the District of Arizona and, with the consent of that court, assigned to the Honorable John M. Roll for

inclusion in the coordinated or consolidated pretrial proceedings in this docket.

FOR THE PANEL:

/s/ John F. Nangle
JOHN F. NANGLE
Chairman

Supreme Court, U.S.
FILED
APR 17 1997
OFFICE OF THE CLERK

No. 96-1482

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

LEXECON INC., *et al.*,
Petitioners,

v.

MILBERG WEISS BERSHAD HYNES & LERACH, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION FOR RESPONDENTS MILBERG WEISS BERSHAD HYNES & LERACH, *ET AL.*

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QUESTIONS PRESENTED

1. Whether certiorari should be granted to review the Ninth Circuit's holding that a district court conducting "pretrial proceedings" under the express grant of authority in 28 U.S.C. § 1407(b) is empowered to order a transfer for trial under 28 U.S.C. § 1404(a), where that holding is consistent with the decisions of all courts that have addressed the issue and with the plain language and legislative history of the applicable statutory provisions.

2. Whether certiorari should be granted to review the Ninth Circuit's holding that a transferee district court is empowered to transfer a case for trial, where petitioners never identified any error or prejudice resulting from the exercise of that power in this case, and where petitioners never asked the Judicial Panel on Multidistrict Litigation to remand the action to the transferor court, even though only the Panel is statutorily authorized to order that relief and petitioners are challenging the facial validity of one of the Panel's own Rules.

3. Whether certiorari should be granted to review the Ninth Circuit's affirmance of the dismissal of petitioners' Arizona law claims for malicious prosecution and abuse of process, where that decision does not conflict with any prior decision and involves at most a case-specific determination concerning petitioners' allegations that does not present any recurring or substantial question of federal law.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

No. 96-1482

LEXECON INC., *et al.*,
Petitioners,
v.
MILBERG WEISS BERSHAD HYNES & LERACH, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS MILBERG WEISS BERSHAD HYNES & LERACH, *ET AL.*

Petitioners seek to keep alive their state law tort claims without raising any substantive challenge to the disposition of those claims on the merits. They do so by raising a procedural question that has provoked no disagreement in the lower courts—whether a case previously transferred for pretrial proceedings under the multidistrict litigation statute, 28 U.S.C. § 1407, can then be transferred for trial by the transferee judge under 28 U.S.C. § 1404. Petitioners offer little reason to believe that the Ninth Circuit's resolution of this issue may have been incorrect. In any event, this case is a poor vehicle for addressing the issue. First, petitioners have not properly preserved the issue. They never sought relief from the Judicial Panel on Multidistrict Litigation, even though the Panel was the sole

tribunal that could have awarded the relief petitioners sought and even though petitioners were challenging the validity of one of the Panel's own Rules. Second, petitioners have not alleged that they were prejudiced in any way by the locus of the trial. In the absence of a showing of prejudice, as this Court recently held in closely analogous circumstances, *see Caterpillar, Inc. v. Lewis,* 117 S. Ct. 467 (1996), there would be no basis for overturning the judgment entered below even assuming that the transferee court erred in retaining the case for trial. The petition should be denied.

STATEMENT OF THE CASE

At the core of this litigation are the materially misleading statements made by petitioners, first in assisting Charles Keating's efforts to defraud bank regulators and the investing public, and later in falsely portraying the settlement in the underlying litigation involving Lincoln Savings & Loan Association ("Lincoln" or "Lincoln Savings"). Petitioner Lexecon Inc. ("Lexecon") prepared false reports for Lincoln Savings to submit to federal and state regulators. In those submissions, despite having received regulators' reports showing extensive regulatory violations and criminal activity involving Lincoln Savings, Lexecon represented that "Lincoln is sound," is "safer than comparable thrifts," and is "safer than when acquired." That is why Lexecon was named as a defendant in *Lincoln Savings.* That also is why Lexecon failed to obtain dismissal of the claims against it, failed to obtain summary judgment after discovery, and failed to obtain a directed verdict after a four-month jury trial. Just as jury deliberations were about to commence, Lexecon settled the underlying litigation by paying the *Lincoln Savings* class more than $700,000 to avoid what would have been, in the words of the judge who presided at trial, a "possible catastrophic verdict." Then, Lexecon undertook a new campaign of deception: Lexecon filed this case against class counsel, alleging that

the class' claims against Lexecon were "baseless," that those claims were "terminated in Lexecon's and Fischel's favor," and that Lexecon "voluntarily" had decided to "benefit the Class" by paying it more than $700,000. Nearly all of Lexecon's claims were dismissed by the district court during pretrial proceedings, and the one remaining claim was rejected by the jury at trial.

1. The Parties.

As noted above, this action arises from federal class action litigation prosecuted in the District of Arizona after the collapse of Lincoln Savings. Petitioner Lexecon was a named defendant in *Lincoln Savings.* Petitioner Daniel R. Fischel was one of the principals of Lexecon. Respondents are the law firm of Milberg Weiss Bershad Hynes & Lerach, along with several of its present and former partners (collectively the "Milberg Defendants"), and the law firm of Cotchett, Illston & Pitre, along with its present and former partners (collectively the "Cotchett Defendants"), all of whom served as counsel for the *Lincoln Savings* class.

2. The *Lincoln Savings* Litigation And Lexecon's Role In That Litigation.

Lincoln Savings involved multiple lawsuits brought in various districts against Charles Keating, American Continental Corporation ("ACC"), its subsidiary Lincoln Savings, and approximately one hundred other defendants, including Lexecon. By the end of that litigation, class counsel (respondents here) had secured a $1.2 billion jury verdict and more than $240 million in settlements for their clients.

Shortly after the *Lincoln Savings* lawsuits were filed, the Judicial Panel on Multidistrict Litigation ("Panel" or "MDL Panel") transferred them under 28 U.S.C. § 1407 to the District of Arizona, to be supervised by the Hon. Richard M. Bilby. The class claims against Lexecon

arose from Lexecon's preparation, for submission by ACC/Lincoln to federal and state banking regulators, of false reports advocating the purported safety of Lincoln's operations and the value of Lincoln's assets. The class claimed that by issuing those false reports, Lexecon wrongfully assisted in propping up Lincoln Savings long enough for ACC/Lincoln to sell millions of dollars of worthless securities. *In re American Continental Corp./Lincoln Sav. & Loan Sec. Litig.*, 794 F. Supp. 1424, 1448 (D. Ariz. 1992).

After extensive discovery, Lexecon filed a motion for summary judgment, which Judge Bilby denied in a published opinion. *Id.* at 1448-49; Pet. App. 5a. The court observed that Lexecon's reports asserted that Lincoln Savings was both "sound" and "safe," even though Lexecon knew about Lincoln's prior wrongdoing, having received and reviewed a Federal Home Loan Bank Board examination report that catalogued Lincoln's "extensive regulatory violations." The court concluded that material issues of fact existed as to the "false or misleading" nature of Lexecon's representations. 794 F. Supp. at 1448-49.

The claims of the class against Lexecon and the other remaining defendants proceeded to trial in March 1992. Judge Bilby, sitting as an MDL transferee judge, transferred the litigation to his courtroom for trial without objection from Lexecon. After a four-month trial, Lexecon filed a motion for directed verdict. The court denied that motion, citing evidence that Lexecon had recklessly "shut [its] eyes" to palpable wrongdoing. CR113 Ex. B at 11948.[1]

3. Lexecon Settles The Claims Against It To Avoid A Jury Verdict.

On June 22, 1992, as jury deliberations were about to commence, Judge Bilby and counsel for Lexecon and the

[1] "CR" refers to the record below and "LSCR" refers to the record in *Lincoln Savings*.

class participated in an in-chambers settlement conference. Having recently lost its motion for directed verdict, Lexecon stated that it wished to avoid a jury verdict but did not want to be perceived as having "settled" for fear of the effect that might have on Lexecon's professional reputation. Pet. App. 5a. Attempting to accommodate Lexecon's purported concern, Judge Bilby and class counsel agreed to a settlement that was structured so as not to appear to be a standard settlement. Under that agreement, Lexecon ultimately paid over $700,000 to the class in exchange for being dismissed. Pet. App. 6a. After Lexecon settled, jury deliberations commenced as to the remaining defendants. The jury found all of them liable and assessed damages that totaled $3 billion. LSCR4044-47. Judge Bilby later remitted the award to a total of $1.2 billion. LSCR4325.

4. Lexecon Sues Class Counsel In Federal Court In Chicago And The *Lincoln Savings* Judge Holds That Lexecon's Principal Allegations Are "False."

On November 25, 1992, petitioners filed this diversity action in the Northern District of Illinois against the Milberg Defendants, the Cotchett Defendants, and other class counsel. Petitioners alleged state law claims for malicious prosecution, abuse of process, tortious interference, defamation, and commercial disparagement. CR1 ¶¶ 2-6; Pet. App. 6a. Petitioners charged that *Lincoln Savings* was "terminated in Lexecon's and Fischel's favor," that class counsel "implicitly acknowleg[ed] the lack of merit in their complaint" by agreeing to a settlement with Lexecon, and that Lexecon "voluntarily" decided to "benefit the Class" by "returning the professional fees paid to it by Lincoln and Keating." CR1 ¶¶ 63-64, 92.

On December 7, 1992, Judge Bilby, who was presiding over the still-pending *Lincoln Savings* litigation, convened a hearing by telephone with class counsel and Lexecon's

trial counsel.[2] Judge Bilby expressed grave concern over Lexecon's allegations, suggested that Lexecon may have perpetrated a "fraud on the Court," and directed the parties to file submissions explaining "why I shouldn't . . . set aside the dismissal of this case without prejudice and reinstate the plaintiffs' claim." CR18 Ex. E at 6. During a subsequent court session, Judge Bilby expressed vexation over Lexecon's characterization in its complaint of its payment to the class as "voluntary," stating "you have no right to come in and misrepresent to a judge in Chicago . . . what this, quote, settlement or resolution was, because . . . it wasn't any voluntary payment on your part. . . . I can put up with ornery lawyers, I can put up with contentious lawyers, but I can't put up with the kind of stuff that absolutely misrepresents what was done in my chambers by a group of lawyers." CR18 Ex. K at 44-45.

On December 31, 1992, Judge Bilby issued an order "to clarify the terms and conditions" of the dismissal of Lexecon. *See* Pet. App. 7a-8a n.2. That order outlined Lexecon's principal allegations in the suit against class counsel and held those allegations to be "false" (*id.*):

> The Court finds these paragraphs [Compl. ¶¶ 63, 64, and 92] to be a false description of the conditions under which Lexecon was dismissed from [the *Lincoln Savings*] case. . . . [I]t does not meet with reality and is factually incorrect.

Judge Bilby emphasized that Lexecon's payment to the class was not "voluntary," but was made so that Lexecon would not have to face a "catastrophic verdict" (*id.*):

> [A]t no time did this Court treat Lexecon's self-serving statements as representing "voluntary" con-

[2] Although trial had concluded, no final judgment had been entered because various settlements and other matters had not been completed. A final judgment order ultimately was entered in *Lincoln Savings* in March 1994. CR431 Ex. B.

> duct. Lexecon did not wish to submit its case to the jury and this Court's "resolution" was the bargained-for method of avoiding a possible catastrophic verdict.

In January 1993, petitioners appealed Judge Bilby's December 31, 1992 order to the Ninth Circuit. Recognizing the case-dispositive significance of that order, Lexecon described the order in its opening brief as "tantamount to a declaratory judgment in favor of Milberg Weiss as defendants in the Chicago lawsuit." Br. 19. The Ninth Circuit dismissed petitioners' appeal as premature because a final judgment in *Lincoln Savings* had not yet been entered. In March 1994, Judge Bilby entered final judgment (CR431 Ex. B), but petitioners failed to appeal from that judgment, and thereby abandoned their opportunity to challenge the findings made in the December 31, 1992 order.

5. Multidistrict Transfer And Proceedings In The District Of Arizona.

In February 1993, the MDL Panel issued a conditional order transferring petitioners' Chicago lawsuit to the District of Arizona, where Judge Bilby was to preside over the litigation along with the remainder of *Lincoln Savings*. As the Ninth Circuit observed in this case, Lexecon "was no stranger to the District of Arizona." Pet. App. 18a. Lexecon had performed professional services for Charles Keating in Arizona. In addition, Lexecon was retained as an expert to assist a defendant in the *Lincoln Savings* litigation pending in Arizona. Lexecon further defended against the claims that the *Lincoln Savings* class later made against Lexecon in Arizona, and consented to the permanent transfer of the *Lincoln Savings* case to Arizona for trial.

After the Panel issued its conditional transfer order, Judge Bilby recused himself because of his personal involvement in the settlement negotiations in *Lincoln Savings*. Pet. App. 61. Thus, in June 1993, in accordance with Section 1407(b)'s provision that MDL proceedings

may be conducted by more than one judge, the Panel issued a final transfer order transferring the lawsuit to the District of Arizona, to be supervised by the Hon. John M. Roll. Pet. App. 100a-02a. The propriety of that order never has been challenged by petitioners and cannot be challenged now. *See* 28 U.S.C. § 1407(e) ("[n]o proceedings for review of any order of the panel may be permitted except by extraordinary writ pursuant to the provisions of title 28, section 1651, United States Code").[3]

In November 1993, Judge Roll, who formerly had been a judge of the Arizona Court of Appeals, issued an order dismissing petitioners' Arizona state law claims for malicious prosecution and abuse of process pursuant to Rule 12(b)(6). Pet. App. 80a-99a. In December 1993, the Milberg Defendants moved for summary judgment with regard to petitioners' remaining claims. CR177; CR181. Petitioners responded by filing a Rule 56(f) motion to defer resolution of the motion pending further discovery. Judge Roll granted Lexecon an opportunity to conduct discovery in order to respond to the summary judgment motion. CR 192.[4]

In August 1994, although discovery had not yet been completed and defendants' summary judgment motions remained pending, petitioners filed a motion requesting that Judge Roll suggest to the MDL Panel that it remand the case to Chicago. CR288. Judge Roll determined that

[3] Petitioners incorrectly contend that the Milberg Defendants filed a motion with the Panel "[a]fter six months of pretrial proceedings" had occurred in Chicago, during which the presiding judge supposedly made several rulings against defendants. Pet. 5. In fact, the Milberg Defendants filed a notice of related action with the Panel on February 9, 1993, *before* defendants filed any responsive pleading and *before* the Chicago judge made any ruling. CR12.

[4] Petitioners leave the impression that defendants did not move for summary judgment until after petitioners moved for a remand in August 1994. Pet. 7. In fact, defendants filed those motions more than seven months before petitioners requested a remand.

the question of remand was premature because discovery was ongoing, but ruled that petitioners could renew their request after discovery closed. CR311. After discovery closed, petitioners renewed their request. CR409. At no time did petitioners ever request relief from the Panel.

On April 24, 1995, Judge Roll entered summary judgment in favor of the Milberg Defendants on all of petitioners' claims, except for a defamation claim based on a letter to the editor of *The National Law Journal*. Pet. App. 64a-79a. Judge Roll also entered summary judgment in favor of the Cotchett Defendants on all of petitioners' claims. *Id.*

On May 5, 1995, Judge Roll transferred the case to the District of Arizona pursuant to Section 1404(a) for trial of the one remaining claim. Pet. App. 61a-62a. Petitioners responded by petitioning for a writ of mandamus, which the Ninth Circuit denied. Pet. App. 55a-60a. On July 25, 1995, trial commenced in Tucson on the defamation claim, and on August 1, 1995, the jury returned a unanimous verdict in favor of defendants. Pet. App. 53a-54a.

6. Appellate Proceedings In The Court Below.

On appeal, petitioners challenged the authority of the district court to transfer the case for trial. However, petitioners did not complain of any error in the court's conduct of the trial proceedings, did not identify any prejudice resulting from the fact that those proceedings took place in Tucson rather than in Chicago, and did not allege any jurisdictional or venue defects associated with proceeding in the District of Arizona. Petitioners' sole contention was that they were entitled to start this litigation over again in Chicago because, by virtue of the district court's allegedly erroneous refusal to suggest a remand to the MDL Panel and the related transfer order, petitioners were deprived of their initial choice of forum.[5]

[5] Petitioners also complained that the district court should have suggested a remand before adjudicating long-pending summary

Petitioners also challenged the district court's Rule 12(b)(6) dismissal of their malicious prosecution and abuse of process claims, contending that they had alleged the necessary elements of those claims under Arizona law, and that all the allegations had to be taken as true even though the *Lincoln Savings* trial judge had entered a final, unappealed order establishing a number of them to be false. Because the district court entered its Rule 12(b)(6) dismissal before petitioners requested a remand, however, petitioners did not challenge the court's authority to adjudicate that motion.

The Ninth Circuit affirmed. Pet. App. 1a-52a. With regard to the district court's transfer order, the Ninth Circuit concluded that the district court's authority to transfer the case for trial under Section 1404(a) is confirmed by the relevant statutory language and legislative history, the Rules promulgated by the MDL Panel, and unanimous judicial practice. Pet. App. 11a-18a.

With regard to the district court's Rule 12(b)(6) dismissal of petitioners' malicious prosecution and abuse of process claims, the Ninth Circuit emphasized that it reviewed that dismissal "de novo, with all factual allegations taken as true and construed in the light most favorable to Lexecon." Pet. App. 21a. The Ninth Circuit further emphasized that in assessing the sufficiency of petitioners' pleadings, it confined its review to those pleadings except insofar as it looked to court orders in *Lincoln Savings* that bore directly on petitioners' claims. Pet. App. 22a-23a. Applying those settled principles, the Ninth Circuit agreed with the district court that petitioners failed to state a claim for either malicious prosecution or abuse of process under Arizona law. Pet. App. 21a-28a.

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judgment motions, but similarly did not assign any legal or factual error in the actual adjudication of those motions. Petitioners have not challenged in this Court the propriety of the summary judgment proceedings.

REASONS FOR DENYING THE WRIT

The petition should be denied because the primary question presented has been answered consistently by the lower federal courts for many years, has seldom been the subject of dispute by litigants, and could not affect the result here in any event.

1. The Ninth Circuit's trial transfer determination does not conflict with the decision of any court. No court ever has denied the authority of a transferee district court, while conducting "pretrial proceedings" under Section 1407, to adjudicate Section 1404(a) transfer motions, as expressly authorized by the MDL Panel's own Rules. The reason is that the practice comports with the plain language of Sections 1407 and 1404(a) and with the applicable legislative history.

2. Even if the transfer question warranted review in the abstract, this case would not be an appropriate vehicle because a ruling on the question could not affect the outcome. Although petitioners argue that the district court abused its discretion in refusing to suggest a remand and in proceeding instead to preside at trial, they have never disputed that the district court had jurisdiction and venue to conduct those proceedings. Nor have petitioners ever assigned any error in the actual conduct of trial or alleged any prejudice resulting from those proceedings, other than to contend that petitioners' initial choice of forum was frustrated. Those omissions are dispositive because "[o]n the hearing of any appeal or writ of certiorari in any case, the court [is required to] give judgment . . . without regard to errors or defects which do not affect the substantial rights of the parties." 28 U.S.C. § 2111. As this Court unanimously held earlier this Term in rejecting a similar attack on a judgment rendered by a federal court of competent jurisdiction, solely on the basis of an erroneous refusal to remand, the result petitioners seek here is "incompatible with the fair and unprotracted administration of justice." *Caterpillar, Inc. v. Lewis*, 117 S. Ct. 467, 477 (1996).

In addition, the Ninth Circuit's holding concerning transfer warrants no further review because petitioners never sought a remand from the MDL Panel, which is the only tribunal empowered to order the relief petitioners desired. Petitioners have waived any right to complain that they never received the relief that only the MDL Panel could grant. Indeed, given that petitioners' contentions directly attack the facial validity of one of the Rules of Procedure promulgated by the Panel, and that petitioners have deprived the Panel of any opportunity to pass on that attack in the first instance, it would be especially inappropriate to grant review.

3. The dismissal of petitioners' malicious prosecution and abuse of process claims likewise does not warrant review. In affirming that dismissal, the Ninth Circuit applied wholly uncontroversial rules for assessing the sufficiency of pleadings. That ruling does not conflict with the decision of any court, and at most involves a case-specific determination that presents no substantial or recurring issue of federal law.

I. THE PRIMARY QUESTION PRESENTED DOES NOT WARRANT REVIEW BY THIS COURT.

A. The Ninth Circuit's Decision Does Not Conflict With The Decision Of Any Court.

The Ninth Circuit's affirmance of the district court's trial transfer order warrants no review because, as petitioners themselves concede (Pet. 20), that decision does not conflict with the decision of any court. To the contrary, every court that has confronted the issue—including eight different courts of appeals—either has approved or recognized without criticism the power of transferee district courts to order changes of venue for trial to their own districts under Section 1404(a). *E.g.*, *In re Korean Air Lines Disaster*, 829 F.2d 1171, 1178 (D.C. Cir. 1987) (D. H. Ginsburg & Williams, JJ., concurring in panel opinion), *aff'd on other grounds sub nom. Chan*

v. Korean Air Lines, 490 U.S. 122 (1989); *Pfizer, Inc. v. Lord*, 447 F.2d 122, 125 (2d Cir. 1971); *In re Fine Paper Antitrust Litig.*, 685 F.2d 810, 820 (3d Cir. 1982), *cert. denied*, 459 U.S. 1156 (1983); *In re Food Lion, Inc. Fair Labor Standards Act "Effective Scheduling" Litig.*, 73 F.3d 528, 532 (4th Cir. 1996); *In re Bendectin Litig.*, 857 F.2d 290, 295 (6th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989); *Kohr v. Allegheny Airlines, Inc.*, 504 F.2d 400, 402 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975); *Washington Pub. Utils. Group v. United States Dist. Ct.*, 843 F.2d 319, 326 (9th Cir. 1987); *Johnson v. Continental Airlines Corp.*, 964 F.2d 1059, 1061 (10th Cir. 1992).[6]

So established is the power that it long has been memorialized in the MDL Panel's own Rules and in the

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[6] *See also In re Mahurkar Double Lumen Hemodialysis Catheter Patent Litig.*, 750 F. Supp. 330, 332 (N.D. Ill. 1990) (Easterbrook, J., sitting by designation); *In re Air Crash Disaster at Detroit Metropolitan Airport*, 737 F. Supp. 391, 393 (E.D. Mich. 1989); *In re Tax Refund Litig.*, 723 F. Supp. 922, 924 (E.D.N.Y. 1989); *In re Longhorn Sec. Litig.*, 573 F. Supp. 274, 276 (W.D. Okla. 1983); *In re Viatron Computer Sys. Corp. Litig.*, 86 F.R.D. 431, 432 (D. Mass. 1980); *In re Air Crash Disaster Near Chicago, Illinois*, 476 F. Supp. 445, 450 (J.P.M.L. 1979); *In re Anthracite Coal Antitrust Litig.*, 436 F. Supp. 402, 403-04 (J.P.M.L. 1977); *In re Bristol Bay, Alaska, Salmon Fishery Antitrust Litig.*, 424 F. Supp. 504, 507 (J.P.M.L. 1976); *Alaska Airlines v. United States*, 399 F. Supp. 906, 912 (N.D. Cal. 1975); *In re Molinaro/Catanzaro Patent Litig.*, 402 F. Supp. 1404, 1405-06 (J.P.M.L. 1975); *In re Bomb Disaster at Roseville, Calif.*, 339 F. Supp. 1400, 1405-06 (J.P.M.L. 1975); *In re Nat'l Student Mktg. Litig.*, 358 F. Supp. 1303, 1304 (J.P.M.L. 1973); *In re Brown Co. Sec. Litig.*, 355 F. Supp. 574, 577 (S.D.N.Y. 1973); *In re Air Crash Disaster at Toronto Int'l Airport*, 346 F. Supp. 533, 534 (J.P.M.L. 1972); *In re Air Crash Disaster at Huntington, W. Va.*, 342 F. Supp. 1400, 1403 n.4 (J.P.M.L. 1973); *In re CBS Color Tube Patent Litig.*, 342 F. Supp. 1403, 1404-05 (J.P.M.L. 1972); *In re Air Crash Disaster Near Hanover, N.H.*, 342 F. Supp. 907, 909 (D.N.H. 1971); *Jack Winter, Inc. v. Koratron Co.*, 326 F. Supp. 121, 123 (N.D. Cal. 1971); *In re Grain Shipments*, 300 F. Supp. 1402, 1404 (J.P.M.L. 1969).

Manual for Complex Litigation. MDL Rule 14(b) provides:

> Each transferred action that has not been terminated in the transferee district court shall be remanded by the Panel to the transferor district for trial, unless ordered transferred by the transferee judge to the transferee or other district under 28 U.S.C. § 1404(a) or . . . § 1406.

The *Manual for Complex Litigation* concurs:

> [T]he [MDL] transferee judge may transfer cases for trial to any district, including the § 1407 transferee district, permitted by 28 U.S.C. § 1404. . . . This procedure may enable the transferee judge to transfer some or all of the cases to the judge's own court for trial.

Manual for Complex Litigation, Third § 31.132 at 254 & n.807 (1995); *accord* Patricia D. Howard, *A Guide to Multidistrict Litigation*, 124 F.R.D. 479, 479 (1989); Stanley A. Weigel, *The Judicial Panel on Multidistrict Litigation*, 78 F.R.D. 575, 581 n.42 (1977).[7]

The absence of a conflict on the question is by itself a strong reason to conclude that petitioners have failed

[7] Although acknowledging the lower courts' unanimous approval of the transfer practice at issue, petitioners and the dissenting judge below insist that "not a single commentator" has found statutory support for that practice. Pet. 15. In fact, commentators repeatedly have done so. Robert A. Ragazzo, *Transfer and Choice of Federal Law: The Appellate Model*, 93 Mich. L. Rev. 703, 751-52 (1995); see Gregory R. Harris, Note, *Consolidation and Transfer in the Federal Courts: 28 U.S.C. Section 1407 Viewed in Light of Rule 42(a) and 28 U.S.C. Section 1404(a)*, 22 Hastings L.J. 1289, 1325-26 (1971); Comment, *The Judicial Panel and the Conduct of Multidistrict Litigation*, 87 Harv. L. Rev. 1001, 1017-23, 1030-32 (1974). Many additional commentators have recognized the practice without criticism. *E.g.*, William W. Schwarzer, et al., *Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute to Permit Discovery Coordination of Large-Scale Litigation Pending in State and Federal Courts*, 73 Tex. L. Rev. 1529, 1534 (1995); Richard L. Marcus, *Confronting the Consolidation Conundrum*, 1995 BYU L. Rev. 879, 885.

to identify a substantial question warranting review by this Court.

B. The Ninth Circuit's Decision Is Correct.

The transfer issue also warrants no further review because the prevailing rule followed by the Ninth Circuit is fully consistent with the plain language of Sections 1407 and 1404(a) and with the relevant legislative history. Petitioners contend that there is an irreconcilable conflict between those two statutes so that, in cases governed by Section 1407, Section 1404 cannot apply. But that conflict is illusory. Taken together, those provisions establish that "Congress contemplated that transferred cases might never return to the transferor courts, but instead might be . . . transferred under Section 1404(a) to that same transferee court." *Korean Air Lines*, 829 F.2d at 1178 (D. H. Ginsburg & Williams, JJ., concurring).

1. The Plain Terms Of Sections 1407 And 1404(a) Support The Decision Below.

The trial transfer order affirmed by the Ninth Circuit finds ample support in the plain terms of Section 1407, as well as in the equally plain terms of Section 1404(a).

Section 1407. The trial transfer order at issue was expressly authorized by Section 1407(b), which empowers the MDL transferee judge to conduct "pretrial proceedings." 28 U.S.C. § 1407(b). The term "pretrial proceedings" plainly includes rulings not only on *dispositive* motions but also on motions for transfer under Section 1404(a). *See In re CBS Color Tube Patent Litig.*, 342 F. Supp. 1403, 1404-05 (J.P.M.L. 1972) ("[a] transferee judge under Section 1407 has the responsibility for all pretrial proceedings in litigation assigned to him and the [Section 1404(a)] motion before [the transferee court] is certainly a 'pretrial' motion"); *In re Mahurkar Double Lumen Hemodialysis Catheter Patent Litig.*, 750 F. Supp. 330, 332 (N.D. Ill. 1990) (Easterbrook, J., sitting by

designation) ("[o]ne of the pretrial questions within my province is whether to accept the magistrate's report and transfer the action to Illinois (that is, to me) under § 1404 . . . . Mahurkar's [Section 1404] motion is granted"); *Greyhound Computer Corp. v. IBM Corp.*, 342 F. Supp. 1143, 1145 (D. Minn. 1972) (same); *In re Antibiotic Antitrust Actions*, 333 F. Supp. 299, 303 (S.D.N.Y.) (same), *mandamus denied sub nom. Pfizer, Inc. v. Lord*, 447 F.2d 122 (2d Cir. 1971); *Jack Winter, Inc. v. Koratron Co.*, 326 F. Supp. 121, 123 (N.D. Cal. 1971) (same). Indeed, petitioners' *amicus*, Professor Charles Alan Wright, has confirmed in his treatise that a motion to transfer under Section 1404(a) is a "pretrial motion" that "falls naturally within the transferee judge's statutory power to control all pretrial proceedings." 15 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3866 at 620 (2d ed. 1986) (further confirming that "there are strong reasons supporting the practice of using Section 1404(a) to enable a Section 1407 transferee judge to retain and determine the merits of the coordinated cases").

Petitioners and their *amicus* nowhere address Section 1407(b) or the transferee judge's statutory power to conduct "pretrial proceedings." Instead, they rest their argument on a single clause in Subparagraph (a) that addresses the duties of the *Panel*—the clause providing that "[e]ach action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings . . . unless it shall have been previously terminated." 28 U.S.C. § 1407(a); *see* Pet. 12; Brief of *Amicus* Charles Alan Wright at 3.

As the Ninth Circuit correctly observed, however, that argument attributes unintended significance to Section 1407(a). The "shall be remanded" clause of Section 1407(a) was concerned with "creating and defining the functions of the JPML, not [with] redefining or circumscribing the traditional powers of the district court to

which a case has been transferred." Pet. App. 15a. Neither that clause, nor any other provision anywhere in Section 1407, purports to prohibit the transferee judge from considering a Section 1404(a) motion in the course of conducting "pretrial proceedings."

Section 1404(a). The transferee court's authority to order trial transfers is further confirmed by the plain language of Section 1404(a), which provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a). Nothing in that categorical language even suggests that the transfer power conferred therein cannot be exercised by MDL transferee judges. To the contrary, as this Court has held, "[t]he reach of 'any civil action' is unmistakable. The phrase is used without qualification, without hint that some should be excluded." *Ex parte Collett*, 337 U.S. 55, 58 (1949).

Petitioners nonetheless suggest that the transfer order at issue did not comply with Section 1404(a) because "that provision only authorizes a district court to transfer a case to 'any *other* district.'" Pet. 12 (emphasis in original). That suggestion ignores the most natural reading of the statutory phrase "other district"—*i.e.*, as a district "other" than the district in which the action was filed. Under that straightforward reading, the trial transfer at issue here *was* to an "other" district. Absent that transfer order, the trial would have occurred in Illinois. Thus, in accordance with this Court's "common-sense approach . . . in interpreting § 1404(a)," *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19, 24-27 (1960), there is every reason to read the statute as authorizing precisely what occurred here—a transfer for trial from Illinois to Arizona.

This reading also avoids an odd consequence of petitioners' proposed interpretation. Under petitioners' "other" district theory, Judge Roll as MDL transferee judge could

have transferred this case for trial to any other district, but not to the District of Arizona. That would make no sense. It is therefore no wonder, as the dissent below observed (Pet. App. 43a), that no federal court of appeals ever has addressed, let alone credited, petitioners' "other" district theory.

Petitioners and their supporting *amicus* also suggest that ordering Section 1404(a) transfers for trial is inconsistent in some way with Congress' 1968 decision to confine Section 1407 to pretrial proceedings, and with Congress' subsequent determination to extend Section 1407 to cover trial only in a limited class of proceedings. *See* Pet. 12-13; Brief of *Amicus* Charles Alan Wright at 4-6. In attempting to attribute dispositive significance to those actions by Congress, petitioners and *amicus* conveniently ignore an important feature unique to Section 1407: it authorizes transfers *regardless* of whether the transferee district is one in which the action could have been brought originally. In contrast, Section 1404(a) trial transfers can be made *only* to districts or divisions where the action "might have been brought." 28 U.S.C. § 1404(a). Given the significant differences in the two statutes, it hardly follows that by declining to authorize Section 1407 transfers for trial in all civil actions, Congress intended to bar MDL judges from ordering Section 1404(a) transfers in appropriate circumstances.

2. The Legislative History Of Section 1407 Supports The Decision Below.

The Ninth Circuit's decision finds further support in the legislative history of Section 1407, which reveals that the MDL statute was intended to *expand* the judiciary's transfer powers, not to preclude or abridge the use of Section 1404. The House Report states that the term "pretrial proceedings" in Section 1407(b) broadly encompasses "the practice and procedure which precede trial of an action" (*see* H. Rep. No. 90-1130, *reprinted in* 1968 U.S.C.C.A.N. 1898, 1900), and stresses that Section 1407

does not prevent transfers under Section 1404(a) (*id.* (emphasis added)):

> [T]he bill provides for the transfer of venue of an action for the limited purpose of conducting coordinated pretrial proceedings. The proposed statute affects only the pretrial stages in multidistrict litigation. It would not affect the place of trial in any case *or exclude the possibility of transfer under other Federal statutes.*

Indeed, in discussing the "shall be remanded" clause in Subparagraph (a), the House Report again suggests the possibility of Section 1404(a) transfers (*id.* at 1901-02 (emphasis added)):

> The subsection requires that transferred cases be remanded to the originating district at the close of coordinated pretrial proceedings. The bill does not, therefore, include the trial of cases in the consolidated proceedings. The experience of the Coordinating Committee was limited to pretrial matters, and the Committee consequently considers it desirable to keep this legislative proposal within the confines of that experience. Additionally, trial in the originating district is generally preferable. . . . *Of course, 28 U.S.C. 1404, providing for changes of venue generally, is available in those instances where transfer of a case for all purposes is desirable.*

Accord S. Rep. No. 90-454 at 5 (1967) ("28 U.S.C. 1404 . . . is available for those instances where transfer of a case for all purposes is desirable").

In sum, the trial transfer power unanimously approved by the courts over the past thirty years is amply supported by the applicable statutory language and legislative history. Although petitioners ask the Court to assume an irreconcilable conflict between Sections 1404(a) and 1407, petitioners' mode of statutory construction is contrary to the usual rule that statutes should be read to avoid such a conflict and to give effect to both statutes.

See, e.g., Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 115 S. Ct. 2322, 2327 (1995). That is easily done here: as the Ninth Circuit held, Section 1404(a) and Section 1407 are complementary, not conflicting, statutory tools for resolving complex litigation justly, efficiently, and consistently.

C. Review Of The Transfer Question Would Be Premature.

Review of the Ninth Circuit's ruling on the transfer issue also would be unwarranted because it would be premature. Prior to this case, according to Judge Kozinski's dissent, the only court of appeals decision that had "seriously addresse[d]" the transfer practice at issue was the Second Circuit's 1971 decision in *Pfizer v. Lord*. Pet. App. 34a (Kozinski, J., dissenting). In addition, again according to Judge Kozinski, at least some of the arguments raised by petitioners had never before been considered by any court of appeals. *Id.* at 43a.

Thus, if this Court were to conclude that the dissent has cast a new light on the transfer practice challenged here, the Court would benefit from further consideration of the matter by the lower federal courts. Because other litigants are likely to raise Judge Kozinski's arguments in other cases, there is no reason to rush to review the first case in which those arguments made an appearance.

II. THIS CASE WOULD PROVIDE AN INAPPROPRIATE VEHICLE FOR REVIEWING THE TRANSFER ISSUE.

Even if the primary question otherwise warranted review, which it does not, this would be the wrong case for such review because no resolution of the transfer question by this Court could alter the result reached here. That is so for two reasons: (1) under 28 U.S.C. § 2111, this Court's recent decision in *Caterpillar*, and numerous other authorities, the proceedings following the allegedly erroneous refusal to remand would have to be sustained because the district court had jurisdiction and venue to preside over those proceedings and petitioners have failed to assign any error or allege any prejudice in the conduct of those proceedings; and (2) petitioners waived their arguments by failing to request a remand from the MDL Panel.

A. There Was No Error Or Prejudice In The Proceedings Following The Transfer For Trial.

Petitioners have never contended that the district court lacked jurisdiction or venue to conduct the trial. Nor have they complained of any error in the conduct of those proceedings; the only ruling that petitioners have ever challenged as substantively erroneous is the Rule 12(b)(6) dismissal of their malicious prosecution and abuse of process claims, but that ruling was a *pre*-trial disposition, and was made months *before* petitioners even requested a remand to Chicago. Finally, petitioners never have contended that they experienced any actual prejudice because proceedings took place in Tucson rather than in Chicago. On these facts, no further review is warranted because any error in the decision below would be harmless. *See* 28 U.S.C. § 2111 ("[o]n the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties").[8]

[8] Petitioners' contention that they were deprived of their choice of forum by itself warrants no relief because the choice of venue is only a privilege that will give way, as Sections 1404(a) and 1407 establish, in appropriate circumstances. *See Burlington Northern R.R. v. Ford*, 504 U.S. 648, 651 (1992) ("[v]enue rules generally reflect [only] equity or expediency in resolving disparate interests of parties to a lawsuit in the place of trial"). Indeed, this Court has held that new statutes concerning venue and transfer—statutes that clearly can have a direct impact on plaintiffs' choice of forum—may be applied retroactively to cases pending at the time of the statute's enactments because such statutes are "wholly procedural"

To our knowledge, no court ever has reversed a judgment on the merits based on an erroneous transfer where, as here, (1) trial proceedings took place in a district where the action could have been brought originally, and (2) no showing of material error or prejudice was made. After all, permitting such reversals would give a losing litigant a second bite at the apple, without any reason to believe that justice was not done in the first trial. *See Magnetic Eng'g & Mfg. Co. v. Dings Mfg. Co.*, 178 F.2d 866, 869 (2d Cir. 1950) ("[u]pon an appeal from a final judgment against it, it will be difficult for the plaintiff to show that it lost the case because of the handicap of the transfer"); *In re Josephson*, 218 F.2d 174, 180 (1st Cir. 1954) ("it is difficult to see" how a reviewing court could vacate a judgment, entered after an allegedly erroneous transfer, where the judgment was rendered in a district in which the action could have been brought); *Filmline (Cross-Country) Prod. v. United Artists Corp.*, 865 F.2d 513, 520 (2d Cir. 1989) ("[s]hould [the movant] finally lose on the merits below, any error in the interlocutory order" denying a change of venue probably would not constitute reversible error because the movant "could hardly show that a different result would have been reached had the suit been transferred" (internal citations omitted)); *In re Dalton*, 733 F.2d 710, 717 (10th Cir. 1984) (recognizing "difficult burden of demonstrating prejudice" stemming from allegedly erroneous transfer after entry of final judgment); 15 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3855 at 472-74 (2d ed. 1986) ("[t]he [Section 1404(a)] order can be reviewed on appeal from a final judgment in the action, although it is very unlikely to constitute reversible error at that stage of the case").

Indeed, this Court recently confirmed that when a plaintiff receives an adjudication free of error and prejudice

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provisions. *Denver & Rio Grande Western R.R. v. Brotherhood of R.R. Trainmen*, 387 U.S. 556, 563 (1967); *Ex parte Collett*, 337 U.S. at 71.

in a federal court with jurisdiction and venue—as petitioners did here—considerations of finality, efficiency, and economy override any error in a prior refusal to order a remand to plaintiff's chosen forum. In *Caterpillar, Inc. v. Lewis*, 117 S. Ct. 467 (1996), a defendant improperly removed a state court case to federal court purportedly on the basis of a diversity of citizenship. A remand was erroneously denied. But because certain parties were later dropped, diversity did exist at the time of trial and judgment.

On appeal, plaintiff argued that he was entitled to another trial because he had been erroneously denied his right to choose the forum. The Court held that his interests were overshadowed by "considerations of finality, efficiency, and economy" (*id.* at 476-77):

> These arguments are hardly meritless, but they run up against an overriding consideration. Once a diversity case has been tried in federal court, with rules of decision supplied by state law under the regime of *Erie* . . . , considerations of finality, efficiency, and economy become overwhelming. . . . To wipe out the adjudication post-judgment, and return to state court a case now satisfying all federal jurisdictional requirements, would impose an exorbitant cost on our dual court system, a cost incompatible with the fair and unprotracted administration of justice.[9]

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[9] The "considerations of finality, efficiency, and economy" that resulted in this Court's decision in *Caterpillar* are of particular significance in Section 1407 cases. Judicial efficiency and finality were primary factors motivating its enactment and Congress' interest in those salutary goals is evident throughout the statute. *See, e.g.*, 28 U.S.C. § 1407(e) (restricting appellate review of Panel transfer decisions only to mandamus review and thereby ensuring that transfer decisions would not be subject to review at end of case). Petitioners' challenges to the final judgment in this case undermine the interests of efficiency and finality that lie at the core of Section 1407.

Those same considerations would dictate the same result here. Like the plaintiff in *Caterpillar*, petitioners' only complaint is that their initial choice of forum was frustrated. As in *Caterpillar*, any error in that ruling would be overcome by "considerations of finality, efficiency, and economy" that arise from the final judgment in this case, which was entered after full discovery and a jury trial. Indeed, that conclusion applies with even greater force in this case because the federalism concerns that inherently accompanied the divestiture of state court jurisdiction in *Caterpillar* are not present here. In addition, unlike in *Caterpillar*, jurisdiction and venue in the District of Arizona existed all along, and petitioners have not suggested any differences—procedural or otherwise—in the way the lawsuit would have proceeded had it been litigated in the Northern District of Illinois rather than in the District of Arizona. Because "[n]othing but a waste of time and resources would be engendered by remanding to the District Court or by forcing the[] parties to begin anew," no further review is warranted. *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 838 (1989).

B. Petitioners Waived Their Challenge By Failing To Ask The Multidistrict Panel For A Remand.

Petitioners' challenge to the ruling below also is unavailing because they never asked the MDL Panel to remand the case to Chicago, even after the district court refused to suggest a remand. Section 1407 provides that remands to transferor courts are to be made only "by the Panel" and are reviewable only by a petition for a writ of mandamus. *See* 28 U.S.C. §§ 1407(a), (e). The MDL Rules state that the Panel shall consider whether to remand a transferred action on: (1) motion of any party; (2) suggestion of the transferee court; or (3) the Panel's own initiative. MDL Rule 14(c). Although Rule 14(d) states that "[t]he Panel is reluctant to order remand absent a suggestion of remand from the transferee district court,"

Rule 14(c) provides that the Panel can order a remand without such a suggestion on motion or *sua sponte*.

Petitioners, however, presented their remand request *only* to the district court. They never sought relief from the MDL Panel, even though the Panel alone could order the relief petitioners were seeking, and even though petitioners' arguments assailed the facial validity of one of the Panel's Rules. *See* MDL Rule 14(b). That failure should foreclose petitioners from bringing their arguments here. Congress has seen fit to vest in the Panel—made up of seven experienced federal judges appointed by the Chief Justice of the United States—exclusive authority to order Section 1407 transfers and remands and to promulgate MDL Rules of Procedure. Petitioners' end-run around the Panel not only threatened to subvert the Panel's authority and the rules concerning appellate review of Panel decisions, but also prevented the Panel from addressing petitioners' attack on one of its Rules and thus deprived this Court of the benefit of the Panel's experience and judgment.

Petitioners defend their failure to take their remand request to the Panel by contending that they were prevented from doing so because: (1) the "proper practice" was to request relief from the district court in the first instance; and (2) once the district court denied petitioners' motion for remand and simultaneously ordered a transfer for trial, it was too late to go to the Panel. Pet. 18 n.8. But nothing in the MDL Rules barred petitioners from going directly to the Panel for relief during the months after they had sought a remand from the district court—or even *after* the district court had entered a transfer order that, according to petitioners, was barred by Section 1407.[10]

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[10] Certainly, petitioners were far from reticent when it came to devising and using aggressive tactics to stop the transferee judge from presiding over the litigation. For example, after Judge Roll initially decided to hold petitioners' remand request in abeyance

In sum, petitioners' failure to request a remand from the only tribunal with authority to grant a remand is another reason why no further review of this case is warranted.

III. THE RULE 12(b)(6) DISMISSAL ORDER WARRANTS NO FURTHER REVIEW.

Petitioners also seek review of the Rule 12(b)(6) dismissal of petitioners' state law malicious prosecution and abuse of process claims, not because petitioners question the district court's authority to order that dismissal, but because in affirming that dismissal the Ninth Circuit supposedly engaged in improper fact finding beyond the four corners of petitioners' complaint. Review of that question would be wholly unwarranted because the Ninth Circuit's ruling follows the usual rules for adjudicating Rule 12(b)(6) motions, does not conflict with the decision of any court, and thus at most presents a case-specific issue concerning the resolution of a routine motion.[11]

First, the Ninth Circuit's affirmance of the dismissal of petitioners' state law malicious prosecution claim warrants

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until the close of discovery, petitioners promptly moved for reconsideration. CR328. When that motion failed, petitioners upped the ante by asking Judge Roll to recuse himself. CR343. Petitioners then attempted to fortify their pending motion for recusal by subpoenaing Judge Bilby, demanding his testimony and production of his bench files, and thereby necessitating a motion to quash filed by the United States Attorney for the District of Arizona. CR386, CR394.

[11] Without citation of authority, petitioners contend that their second question presented need not be considered should the Court grant certiorari and reverse on the transfer issue, because that result somehow would render the district court's and the Ninth Circuit's Rule 12(b)(6) decisions a nullity. Pet. 27 n.9. Particularly in light of this Court's recent *Caterpillar* decision, however, that contention is specious. Indeed, the justification for rejecting that contention under *Caterpillar* is particularly strong given that petitioners never have disputed the MDL transferee judge's authority to adjudicate defendants' Rule 12(b)(6) motions and do not do so here.

no further review because that decision is in accordance with accepted standards for adjudicating Rule 12(b)(6) motions. Although petitioners contend that the Ninth Circuit ignored the principle that "a court must accept the truth of all allegations in the plaintiff's complaint" (Pet. 22), the decision below belies that charge (Pet. App. 21a):

> We now turn to Lexecon's appeal from the dismissal by the district court under Fed. R. Civ. P. 12(b)(6) of its malicious prosecution and abuse of process claims. Our review of this dismissal is de novo, with all factual allegations taken as true and construed in the light most favorable to Lexecon.

Similarly, it was hardly controversial for the court to have relied on final orders issued by another federal court in a related case. *See* Pet. 22a-23a (citing cases); *Papasan v. Allain*, 478 U.S. 265, 268 n.1 (1986) (in considering Rule 12(b)(6) motion, "we are not precluded . . . from taking notice of items in the public record," including "historical facts" that form the basis for the claims for relief); 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357 at 299 (2d ed. 1990) ("matters of public record, orders, items appearing in the record in the case, and exhibits attached to the complaint" may be considered in adjudicating a Rule 12(b)(6) motion).

Petitioners suggest that "[i]n the court's view, it is perfectly appropriate for a court to use any material in the 'public record'—which could include, for example, newspaper articles, investigative reports, and all sorts of public filings by private parties—as a basis for rejecting, at the motion to dismiss stage, the factual assertions in a plaintiff's complaint." Pet. 22 (citing Pet. App. 23a). In fact, the Ninth Circuit neither did nor said anything resembling petitioners' account. Instead, on the basis of "ample authority" authorizing judicial notice of "court records in related or underlying cases" in connection with Rule

12(b)(6) motions, the Ninth Circuit looked only to Judge Bilby's published summary judgment opinion and his December 31, 1992 order in determining that petitioners had failed to state a claim. Pet. App. 22a-23a. As the Ninth Circuit observed, that approach was not only authorized by law, but dictated by common sense. *Id.* at 23a. That is particularly true given that petitioners themselves referred to the summary judgment proceedings and the December 31, 1992 order in their amended complaint. CR127 ¶¶ 68-70, 108-11.

Second, the Ninth Circuit's affirmance of the dismissal of petitioners' abuse of process claim likewise comports with well-established principles of law. Although petitioners take a passage from the decision below out of context and use it to accuse the Ninth Circuit of engaging in improper fact finding concerning motive (Pet. 24), the section immediately following the passage cited by petitioners reveals that the court did no such thing. Instead, the Ninth Circuit set forth the complaint's allegations in light of the substantive elements of an abuse of process claim under Arizona law, and concluded that even if all those allegations were accepted as true, they did not state a claim for relief under Arizona law because the complained-of conduct either occurred before process issued or constituted a lawful and proper use of process. Pet. App. 27a-28a. That case-specific application of Arizona law to the allegations in petitioners' complaint is correct, does not conflict with the decision of any court, and does not warrant review in this Court.

In light of the substantial evidence of Lexecon's fraud in *Lincoln Savings* that Judge Bilby cited in denying Lexecon's motions for summary judgment and directed verdict, and in light of Judge Bilby's unappealed ruling that the allegations lying at the heart of the dismissed claims in this case were "false," it was neither erroneous nor improper for the courts below to refuse Lexecon's invitation to turn a blind eye to those prior orders. Consistent with the obligations of good faith and Fed. R. Civ. P. 11, Lexecon's claims for malicious prosecution and abuse of process never should have been alleged at all. They certainly warrant no further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1996

LEXECON INC., *et al.*,

Petitioners,

v.

MILBERG WEISS BERSHAD HYNES & LERACH, A PARTNERSHIP, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

COTCHETT BRIEF IN OPPOSITION

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QUESTIONS PRESENTED RELATIVE TO THE SEPARATE JUDGMENT IN FAVOR OF THE COTCHETT DEFENDANTS

1. Whether *certiorari* should be granted to review a separate judgment entered in favor of certain defendants resulting entirely from dispositive pretrial motions granted *before* the order of transfer for trial as to certain *other* defendants.

2. Whether *certiorari* should be granted to review the contention that the mere filing of a motion to refer to the JPML for remand divests the transferee court of authority to decide then pending dispositive pretrial motions.

3. Whether *certiorari* should be granted to vacate a summary judgment, litigated in a court with undisputed personal jurisdiction and venue, and where there is no claim of substantive error or showing of prejudice, so it can be re-litigated in another court (of dubious personal jurisdiction).

4. Whether *certiorari* should be granted to review a Rule 12(b)(6) dismissal of state law claims of malicious prosecution and abuse of process because the District Court took judicial notice of undisputed prior proceedings and orders in the underlying case.

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INTRODUCTION

The Petition obscures the record insofar as it concerns Petitioners' claims against Respondents Joseph W. Cotchett, Susan Illston, Cotchett & Pitre f/k/a Cotchett, Illston & Pitre ("Cotchett Defendants" or "Cotchett"). All of those claims were dismissed upon pretrial motions. The motions were made *before* Petitioners ("Lexecon") moved to refer for remand. The Orders granting those motions were entered *before* the Order of "permanent transfer" for trial of a claim by Lexecon against only the Milberg Defendants.

A separate judgment of dismissal was entered in favor of the Cotchett Defendants. Lexecon appealed from that judgment *before* the trial against the Milberg Defendants. The Cotchett Defendants, having previously been dismissed as parties to the case, were not parties to the trial.

There is no issue as to transfer for trial, or trial venue, or "permanent transfer," or "self-transfer" with respect to the Cotchett Defendants.

Although Lexecon does not directly raise an issue of the transferee Court's authority to decide pretrial dispositive motions, that issue is nevertheless an inherent part of its Petition for at least two reasons. First, Lexecon fails to distinguish the distinct claims, proceedings, and judgment with regard to the Cotchett Defendants on the one hand and the Milberg Defendants on the other. Second, what Lexecon seeks to achieve in petitioning for *certiorari* (and advocated in a footnote in the dissenting opinion below) is to vacate all orders, proceedings, and judgments of the transferee Court from August 5, 1994 to

December 12, 1995, including the summary judgment of April 24, 1995, and to recommence and re-litigate all of those matters in the District of Illinois.

STATEMENT OF THE CASE

This case, part of MDL Docket No. 834, District of Arizona, resulted in a number of appeals and proceedings in the Court of Appeals that were consolidated for hearing. Lexecon's separate appeal from the separate judgment entered in favor of Cotchett is Court of Appeals Docket No. 95-16403.

A. The Cotchett Defendants.

The Cotchett Defendants are residents of California. They do not do or solicit business in Illinois (CR 310, Ex. D).[1] The alleged acts in Illinois that Lexecon claimed gave rise to personal jurisdiction there were not committed by any of the Cotchett Defendants (*Id.*, Exs. E, F).

The Cotchett firm filed one of the early *Lincoln Savings* cases in California. It was transferred to Arizona and consolidated with others. The firm was appointed by the Court as one of several "co-lead" class counsel. Responsibility for prosecuting the claims against over 100 defendants was divided among class counsel. Lexecon was the Milberg firm's responsibility.

[1] "CR" refers to the record, or docket, by document number in the District Court.

Lexecon alleged below (after six months of discovery) that "Milberg Weiss" made the decision to add Lexecon as a defendant for the alleged ulterior purpose to create a "weapon" that "Milberg Weiss" could use to "extort unfair advantages" from Lexecon in other cases where Fischel was adverse to Milberg (CR 289, ¶¶ 36, 38). The Cotchett firm was not adverse to Lexecon in any other case. Mr. Fischel admitted in deposition that he had never even met Mr. Cotchett or Ms. Illston until the trial in *Lincoln Savings*, and that he had never encountered them in any other case (CR 484, Ex. B, 308/1-309/3, 309/4-314/3).

The original attorney engaged by Lexecon to prosecute this case testified that Lexecon never complained that any of the Cotchett Defendants were engaged in conduct which Lexecon claims caused it damage (CR 484, Ex. D). One of Lexecon's lawyers in *Lincoln Savings* testified that he did not know why the Cotchett Defendants were made part of this case (CR 484, Ex. F). He did not even know who they were (*Ibid*).

In Lexecon's Brief filed in the Court of Appeals on April 23, 1993, it stated that its case was based upon "acts of Milberg Weiss" (no mention of the Cotchett Defendants) (CR 484, Ex. G).[2]

[2] Lexecon's case against the Cotchett Defendants was based upon the theory of civil conspiracy which Arizona does not recognize. *Tovrea Land and Cattle Co. v. Linsenmeyer*, 412 P.2d 47, 63 (Ariz. 1966); *Hansen v. Stoll*, 636 P.2d 1236 (Ariz. App. 1981) (malicious prosecution); *Savard v. Selby*, 508 P.2d 773 (Ariz. App. 1973) (driving out of business); *Hirsch v. Cooper*, 737 P.2d 1092 (Ariz. App. 1986) (defamation).

B. Lexecon's nationwide business.

Lexecon and Fischel conduct a nationwide business of providing expert testimony and consulting for defendants in securities cases. The "vast majority" (Fischel's term) of its work involves cases pending outside of Illinois (CR 443, Ex. A at 358/15-24).

One of Lexecon's Arizona clients was Charles H. Keating, Jr. who became notorious nationwide as a perpetrator in what has become nationally known as the "savings and loan scandal." Lexecon provided reports for submission by Keating's Lincoln Savings to federal and state regulators touting Lincoln's financial condition.

C. Lexecon proceeds to trial in Arizona, settles, then sues class counsel in Illinois.

The consolidated class in *Lincoln Savings* alleged that Lexecon's reports for Lincoln were false, and that Lexecon thereby aided and abetted Keating/Lincoln in defrauding regulators. Thus, Lexecon was named as a defendant in the *Lincoln Savings* case. It litigated that case in Arizona for over two years, and proceeded to trial in Arizona. (The Arizona transferee Court transferred the case to itself for trial without objection from Defendant Lexecon).

In denying Lexecon's motion for summary judgment in *Lincoln Savings*, Judge Bilby found from the evidence that Lexecon had issued several reports on behalf of Lincoln which "rebutted regulatory criticism on material issues" (*In Re ACC/Lincoln*, 794 F.Supp. 1424, 1448 (D. Ariz. 1992)). Among other things, Lexecon reported that

"Lincoln is sound," and "safer than comparable thrifts" (*Ibid*). (*Cf. Lincoln v. Wahl*, 743 F.Supp. 901, 906 (D.C. 1990), where the Court found that: "It is abundantly clear that Lincoln was in an unsafe and unsound condition.")

The Court concluded that "the record raises material issues" as to whether the reports were "false or misleading when viewed as a whole" (*In Re ACC/Lincoln, supra*, 794 F.Supp. at 1448). Thus, "the record raises material questions concerning Lexecon's knowledge and intent to aid and abet a course of conduct violative of Section 10(b), RICO, AZRAC [Arizona RICO], and common law fraud" (*Id*. at 1449).

Lexecon's motion for a directed verdict was similarly denied (after four months of trial). Lexecon then told the Court that it did not want to have the case against it submitted to the jury. It wanted to settle in a discreet manner to avoid "stigma" (CR 18, Exs. B, K). Class counsel accommodated Lexecon, suggesting that the settlement be referred to as a "resolution" (CR 18, Ex. B). The Court accepted that and Lexecon thereby avoided the verdict ($3 billion, later reduced to $1.2 billion).

On November 25, 1992, a month after completing payment of in excess of $700,000 pursuant to the settlement, Lexecon filed this diversity case in Illinois against lead class counsel, collaterally attacking the Arizona case that it had settled.

D. The adjudication that Lexecon's complaint was false.

In its complaint, Lexecon alleged that the *Lincoln Savings* case "was terminated in Lexecon's and Fischel's [he was not even a defendant] favor," and that the settlement was an "implicit acknowledgment" by class counsel of the lack of merit in the complaint against Lexecon (CR 1; ¶¶ 92, 122).

Judge Bilby, who had continuing jurisdiction over *Lincoln Savings* settlements, held a hearing, and received briefs and affidavits with respect to those allegations. He then ruled, in an Order dated December 31, 1992 (Pet. App. 7a), that the allegations were false; that the fact was that Lexecon settled to avoid a "catastrophic verdict," and was not a prevailing party (CR 383, Ex. 3, fn. 1 – omitted in Ct. App. Op. at Pet. App. 7a).

Lexecon sought to appeal the Order of December 31, 1992, characterizing it as "tantamount to a declaratory judgment in favor of Milberg Weiss as defendants in [this] lawsuit" (Lex. 4/23/93 Ninth Cir. Br. 19). The appeal was dismissed as premature because a final judgment had not yet been entered in the *Lincoln Savings* case. In March, 1994, a final judgment was entered (CR 431, Ex. B). Lexecon did not appeal from that judgment.

E. MDL transfer to Arizona.

Lexecon's false allegations were of concern to the JPML in transferring the case to Arizona since they pertained directly to one of the settlements under Judge Bilby's continuing jurisdiction:

> "JUDGE POLLACK: * * * [T]hat [Lexecon] settlement is very much alive before Judge Bilby, and he has not recused himself from it.
>
> Speak to that.
>
> LEXECON'S COUNSEL: We still have to come back to the question of what is the Lexecon case in Chicago going to be consolidated or coordinated with. * * *
>
> JUDGE POLLACK: We can take care of that very simply by leaving the whole thing in Arizona where it belongs in the settlement. * * * " (CR 310, Ex. B, JPML Tr. 5/21/93, pp. 9-10).

Also of concern was that Lexecon's counsel told the Panel that the District Court in Chicago said that the Order of December 31, 1992 would not be binding in Illinois (CR 310, Ex. B, *supra*, pp. 12-13) (in effect, giving Lexecon an "horizontal appeal").

The final Transfer Order to Arizona was entered on June 3, 1993 (CR 122). Lexecon did not challenge it. It did not challenge the fact that the transferee Court had personal jurisdiction and proper venue over Lexecon and all Defendants. It never petitioned the Panel for remand.[3]

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[3] Under 28 U.S.C. § 1407(a) only "the Panel" can remand, not the transferee court. See *Antibiotic Antitrust Actions*, 538 F.2d 180, 196 and fn. 31 (8th Cir. 1976); Rule 14(c), JPML (transferee court can only "suggest" that the Panel remand).

F. The termination of the case against the Cotchett Defendants during pretrial proceedings.

On November 29, 1993, the transferee court in Arizona (Judge Roll) dismissed, on Rule 12(b)(6) motion, the first two counts of Lexecon's Amended Complaint: for malicious prosecution and abuse of process in the underlying Arizona *Lincoln Savings* case (Pet. App. 80a).

On January 14, 1994, the Cotchett Defendants filed a motion for summary judgment on all remaining counts (CR 186). Judge Roll granted Lexecon's Rule 56(f) application and allowed it approximately 10 months of (unrestricted) discovery before filing its opposition (CR 192, 234).

On August 9, 1994, after all defendants' motions for summary judgment were pending for eight months, Lexecon filed a motion to refer the case back to the JPML for remand to Illinois (CR 288). The motion was stayed with leave to renew at the close of discovery (CR 311). The Milberg Defendants moved for the stay. The Cotchett Defendants opposed the motion on the merits, and conditionally cross-moved for permanent transfer to Arizona (citing, among other things, the convenience of the Cotchett witnesses and the absence of personal jurisdiction over Cotchett in Illinois, CR 309).

In Mr. Fischel's deposition of October 27, 1994, he testified that a number of Lexecon witnesses would find Arizona a more convenient forum for trial than Illinois (CR 443, p. 9, fn. 2, Ex. C). Lexecon's Arizona counsel, who was its principal counsel during pre-trial proceedings, said "They'd rather come here [Tucson] than go to

Chicago" (*Id.* at third page of Ex. C). Fischel acknowledged that the trial might occur in Arizona: "Absolutely, may occur in Arizona" (*Ibid*).

Lexecon renewed its motion on November 4, 1994 (CR 409). All Defendants opposed on the merits and cross-moved for transfer to Arizona (CR 443, 444, 457, 487).

All motions for summary judgment were argued on April 6, 1995 (CR 580). On April 24, 1995, the Court granted the Cotchett motion for summary judgment in full, dismissing all remaining claims against them (Pet. App. 64a).

On May 1, 1995, the Cotchett Defendants lodged a separate Rule 54(b) judgment of dismissal (CR 585). Lexecon filed objections on May 8, 1995 (CR 587) challenging only the exercise of Rule 54(b) discretion. There was no challenge to the transferee court's jurisdiction or authority to enter a final judgment in favor of the Cotchett Defendants.

On May 5, 1995, the Court ruled on all venue motions. It entered a "permanent transfer" order for purposes of trial, *i.e.*, that the sole claim surviving summary judgment – a single defamation claim against Milberg Weiss resulting from a letter written to a newspaper by one of its lawyers – was to be tried in Arizona (Pet. App. 61a; CR 586).

On June 7, 1995, a separate Rule 54(b) judgment in favor of the Cotchett Defendants was entered (CR 602; Cotchett App. 1). Cotchett recovered costs (CR 604) and Lexecon paid the costs in full on June 22. On July 3, 1995,

Lexecon appealed from that separate judgment (Cotchett App. 2). In its Docketing Statement (Cotchett App. 3), it stated that it was appealing the merits of both the Rule 12(b)(6) and Rule 56 orders. There was no reference whatsoever to any issue pertaining to transfer for trial or remand. (The substantive appeal from the Rule 56 Order was abandoned.)

Thereafter, on July 25, 1995, Lexecon proceeded to try its defamation claim against Milberg Weiss and lost. Its appeal on August 1, 1995 from the judgment entered in favor of Milberg Weiss was consolidated in the Court of Appeals with Lexecon's prior appeal from the June 7, 1995 judgment in favor of Cotchett.

G. Lexecon invokes, and accepts the benefits from the transferee Court's dispositive motion jurisdiction.

On December 13, 1994, four months after Lexecon now contends the transferee Court lost all authority to rule on dispositive motions, it filed its own dispositive motion before Judge Roll and pursued it to a successful conclusion. The motion was one to dismiss Milberg Weiss' amended counterclaims (CR 477). The motion was not filed conditionally, or "without prejudice" to Lexecon's motion as to remand (*Ibid*).

Lexecon's motion to dismiss was granted in full (Pet. App. 77a-79a) (and affirmed on appeal, *Id.* at 28a-29a). Lexecon filed a Bill of Costs on August 18, 1995 alleging that, if the Milberg Defendants were entitled to recover costs in prevailing on Lexecon's claims, it should recover costs as the "prevailing party" on the Milberg Defendants' counterclaims (CR 691). Lexecon recovered its

costs in full, approximately $10,000, and that sum was deducted from the cost award to Milberg Weiss (Order, 11/13/95; Amended Judgment 12/12/95). Lexecon paid Milberg Weiss the net amount which was accepted as payment in full (Acknowledgment 1/11/96).

REASONS FOR DENYING THE WRIT AS TO THE SEPARATE JUDGMENT IN FAVOR OF THE COTCHETT DEFENDANTS

1. Further review is not warranted because a transferee court's authority to terminate a case by pretrial dispositive motion is uncontested and beyond challenge.

There is nothing about the exercise of that authority that calls for a nationally binding pronouncement to resolve conflict or clear up confusion in the lower courts. There is no conflict. There is no confusion.

2. *Certiorari* should not be granted to review the contention that the mere filing of a motion to refer to the JPML for remand divests the transferee court of authority to decide then pending dispositive pretrial motions.

There is no conflict or confusion in the lower courts with respect to such a contention. There is no authority or support for such a contention in the MDL statute, case law, or sound policy.

Moreover, if such a contention were accepted, it would empower a litigant to unilaterally terminate the

MDL process at any time he chooses, merely by filing a motion. That would undermine the MDL process.

3. *Certiorari* should not be granted to vacate a summary judgment, litigated in a court with undisputed personal jurisdiction and venue, where there is no claim of substantive error or showing of prejudice, so it can be re-litigated in another court (of dubious personal jurisdiction).

There is no conflict or confusion in the lower courts concerning a purported right to re-litigate in another district an error free adjudication by a court with jurisdiction and venue. On the contrary, this Court has recently and unanimously ruled that, absent a showing of prejudice, even erroneous venue decisions do not justify the cost, time, and resources for re-litigation. *Caterpillar, Inc. v. Lewis*, 117 S.Ct. 467 (1996).

4. *Certiorari* should not be granted to review a Rule 12(b)(6) dismissal of state law claims of malicious prosecution and abuse of process because the District Court took judicial notice of undisputed prior proceedings and orders in the underlying case.

The challenged ruling is consistent with existing case law and practice in taking judicial notice of matters of public record. There is no conflict or confusion in the lower courts with respect to that practice. Lexecon's Rule 12(b)(6) argument was not even addressed by the dissenting Judge in the Court of Appeals.

Moreover, the challenged ruling turned on review of the particular record in a particular case and the application of state law. Even if the ruling were not correct, that

does not warrant *certiorari*. This Court does not sit to correct error in individual cases.[4]

I

FURTHER REVIEW IS NOT WARRANTED BECAUSE A TRANSFEREE COURT'S AUTHORITY TO TERMINATE A CASE BY PRETRIAL DISPOSITIVE MOTION IS UNCONTESTED AND BEYOND CHALLENGE.

An MDL transferee court's authority to adjudicate dispositive motions is confirmed by the language of the statute, its legislative history, MDL Rules, and unanimous case law. *See* 28 U.S.C. § 1407(a) (no remand if case "previously terminated"); 28 U.S.C. § 1407(b) (authority to conduct "pretrial proceedings"); H. Rep. No. 1130, 90th Cong. 2d Sess., *reprinted* in 1968 U.S.C.C.A.N. at 1900 ("the transferee court would have authority to render summary judgment"); Rule 14(a), JPML ("[a]ctions terminated in the transferee district court by valid judgment, including, but not limited to summary judgment . . . shall not be remanded . . . "); *Korean Airlines*, 829 F.2d at 1172, 1178 (D.C. Cir. 1987) (majority and concurring opinions);

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[4] We do not address Question No. 1 in the Petition because, as demonstrated *supra*, that question does not apply to the Cotchett Defendants. If it did, we would ask leave to join in the Milberg Defendants' Brief in Opposition. We endorse that Brief. On the question of venue for trial, we believe that the Milberg Defendants have correctly addressed the long-standing and universal practice by the Circuits that is consistent with the MDL statute and its purpose and policy. Lexecon's position in this regard is formalism above substance. Absent a showing of prejudice and a claim of substantive error, this is not the right case to test an academic argument universally rejected by all Circuits that have considered it.

numerous cases cited in Wright, Miller & Cooper, *Fed. Prac. & Proc.*: Jurisdiction 2d § 3866, n. 10 (1986) and 1996 pocket part; WM&C's Supp. Serv., 3/97 ("transferee court has the authority to enter dispositive orders terminating cases consolidated under 28 U.S.C. § 1407"); Manual for Complex Litigation (Third) § 31.132 at 253 (1995); Weigel, *The Judicial Panel on Multi-District Litigation, Transferor Court and Transferee Courts*, 78 F.R.D. 575, 582-83 (1978).

The dissenting Judge in the Court of Appeals did not take issue with the foregoing authorities. He concurred:

> "It is true that an MDL court can dispose of a case by settlement or motion and thus prevent the JPML from remanding it. But that is a possibility expressly accounted for in section 1407(a), which releases the JPML from its obligation to transfer the case back to its originating district if 'it shall have been previously been terminated.' * * * Congress may have felt that federal judges are fungible for purposes of resolving legal questions . . . " (Pet. App. 39a, 41a).

II

CERTIORARI SHOULD NOT BE GRANTED TO REVIEW THE CONTENTION THAT THE MERE FILING OF A MOTION TO REFER TO THE JPML FOR REMAND DIVESTS THE TRANSFEREE COURT OF AUTHORITY TO DECIDE THEN PENDING DISPOSITIVE PRETRIAL MOTIONS.

A. The contention.

The dissent below, after concluding that the District Court abused its discretion in transferring the remaining claim against Milberg "to itself" under 28 U.S.C.

§ 1404(a), concluded that: "We must therefore vacate that order and all *subsequent orders* entered by the district court including, of course, the final judgment entered after trial" (emphasis added) (Pet. App. 52a). That does not impact on the Cotchett Defendants since the orders dismissing all claims against them were entered *prior to* the transfer order.

However, the dissent, in a footnote that follows the quoted conclusion states (without citation to authority): "All orders" entered after Lexecon filed its motion to refer for remand "on August 5, 1994," "particularly the summary judgment granted on April 24, 1995, should be vacated." It is that supplemental conclusion in dissent footnote 22 that Lexecon urged in the Court of Appeals and what it seeks to achieve in this Court. That is the only part of the dissent that impacts on Cotchett.

B. The chronology.

The Cotchett motion for summary judgment was pending for eight months *before* Lexecon filed its first request to refer for remand. The delay in adjudication was an accommodation of *Lexecon's request* for ten months of discovery in order to file an opposition. The fact that the adjudication did not occur before Lexecon filed its first request to refer for remand is not the result of anything that the defendants did or the District Court initiated. It was the result of accommodating Lexecon's request for delay.

C. No basis in law or practice.

There is no basis in the MDL statute, its legislative history, case law, policy, or legal commentary, for the position that the mere filing of a motion to refer for remand divests the transferee court of authority it otherwise undisputedly has to decide pending dispositive pretrial motions. If Congress intended that the mere filing of a motion to refer for remand terminated the authority of the transferee court, it could easily have enacted such a provision.

Moreover, such a rule would undermine the MDL process. It would empower a litigant to unilaterally terminate proceedings in the transferee court (ordained by statute and ordered by the JPML) merely by filing a motion. If that were the case, the motion could be filed the day after transfer and preclude the transferee court from conducting the pretrial proceedings it is obliged to conduct by statute and JPML order.

D. No claim of substantive error or showing of prejudice.

Such a drastic rule would be particularly inappropriate where, as here, there is no assignment of error in the summary judgment and no showing of prejudice. Lexecon abandoned its appeal of the summary judgment in favor of Cotchett by not arguing it in its Opening Brief in the Court of Appeals. *E.g., Officers of Justice v. Civil Serv. Comm.*, 979 F.2d 721, 725 (9th Cir. 1992). It made no attempt in the Court of Appeals, and makes no attempt in its Petition, to demonstrate that there was a material issue

of fact with respect to the counts dismissed on summary judgment.

Moreover, Lexecon made no attempt in the Court of Appeals, and makes no attempt in its Petition, to demonstrate actual prejudice as the result of the District Court in Arizona rather than the District Court in Illinois deciding the summary judgment motions (including Lexecon's own dispositive motion). To paraphrase the dissenting Judge below, federal judges are "fungible for purposes of resolving legal questions . . . " (Pet. App. 41a).

Lexecon may have a strategic *preference* for a particular federal judge, but it has no *right* to have any particular federal judge hear and decide motions.

Even if Lexecon's contention were tenable, and the mere filing of a motion for remand renders the transferee court an improper venue to decide pending motions, there is no authority that supports the position that an adjudication free of error and prejudice in a federal court with jurisdiction and venue should be vacated because of an alleged erroneous refusal to transfer venue. Indeed, this Court has recently settled the law to the contrary in its unanimous decision in *Caterpillar, Inc. v. Lewis, supra. See also, Montana v. U.S.*, 440 U.S. 147, 153-54 (1979) where this Court held:

> "To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions."

E. The transferor Court lacked personal jurisdiction over the Cotchett Defendants.

Additionally, here the transferor Court lacked personal jurisdiction over Cotchett. As indicated *supra*, they are California residents who do not do or solicit business in Illinois and none of the alleged acts in Illinois that Lexecon claimed were jurisdictionally significant were committed by them.[5]

In the transferor district, Milberg moved to dismiss for lack of jurisdiction and Cotchett joined in the motion (CR 15). The Court denied the motion in a lengthy opinion which found that Milberg Weiss conducted business in Illinois but which did not make any such a finding with respect to Cotchett (CR 107). There was no finding identifying a single act of the Cotchett Defendants in Illinois (*Ibid*). The Court held that the mere allegation of conspiracy was sufficient to confer personal jurisdiction over all alleged conspirators (*Id.* at 5).

Matters of personal jurisdiction may be raised at any time. *Board v. WHI*, 292 F.2d 1061 (10th Cir. 1993). Even if Lexecon's bare allegation as to conspiracy were sufficient to survive a provisional challenge pre-discovery, that did not bar a renewed challenge after discovery. *E.g.*, *Welinsky v. Resort of the World*, 839 F.2d 928, 930 (2d Cir.

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[5] While Lexecon was preparing the filing of its case in Chicago, its lawyers concluded that Illinois did not have long-arm jurisdiction over the Cotchett Defendants and that the lawyers would be faced with a "Rule 11 problem" if they asserted it (CR 310, Ex. C).

1988). The burden on Lexecon post-discovery was different from what it was when Judge Zagel ruled provisionally pre-discovery: it had to make a *prima facie evidentiary* case; bare *allegations* were no longer sufficient. *E.g., United Bank of Kuwait v. James M. Bridges*, 766 F.Supp. 113 (S.D.N.Y. 1991).

In response to Lexecon's first motion to refer and remand, Cotchett renewed their challenge to personal jurisdiction over them in Illinois (CR 309, Pt. IV, 310). Lexecon's response was merely to cite to the transferor Court's provisional ruling as to the allegation of conspiracy (CR 321, p. 12). It made no attempt to identify a single act of any of the Cotchett Defendants in Illinois (*Ibid*).

Assuming, *arguendo*, that the co-conspirator theory of personal long-arm jurisdiction could pass constitutional muster,[6] the "cases are unanimous that a bare allegation of conspiracy" is "not enough." *Stauffacher v. Bennett*, 969 F.2d 455, 459-60 (7th Cir. 1992).

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[6] *See, Rush v. Savchuk*, 444 U.S. 320, 332 (1980) ("the requirements of *International Shoe* [mandating minimum contacts] must be met as to *each* defendant over whom a state court exercises jurisdiction") (emphasis added); *Kipperman v. McCone*, 442 F.Supp. 860, at 873, fn. 14 (N.D.Ca. 1976) (the contention that personal jurisdiction, the exercise of which is governed by strict constitutional standards, may depend upon the imputed conduct of a co-conspirator is "frivolous"); Note, *Long-arm Jurisdiction and Multiple Defendants: The Conspiracy Theory of In Personam Jurisdiction*, 84 Columbia L. Rev. 506 (1984) ("theory may contravene constitutional commands" and "may lead to unconstitutional results" pp. 506, 536); Althouse, *The Use of a Conspiracy Theory to Establish In Personam Jurisdiction: A Due Process Analysis*, 52 Fordham L. Rev. 234, at 253 (1983).

In response to Lexecon's renewed motion to refer for remand (CR 409), Cotchett again renewed their jurisdictional challenge (CR 443, Pt. II-III; 476, Pt. II), with the same lack of response from Lexecon except to merely cite to the transferor Court's provisional opinion as to the conspiracy allegation (CR 468, pp. 14-15).

The issue of personal jurisdiction over Cotchett in Illinois was relevant to Lexecon's transfer motions and Cotchett's cross-motion. It is contrary to the policies of judicial economy, efficiency, and finality to transfer a case to a district where there is doubt as to personal jurisdiction. Such doubt should be resolved by transfer to a district where there is no such issue (*e.g.*, Arizona in this case). *Sparling v. Hoffman Construction Co.*, 864 F.2d 635, 639 (9th Cir. 1988).

F. Estoppel.

Finally, Lexecon should be estopped from contending that the transferee Court lost its authority to rule on dispositive pre-trial motions when it filed its motion to refer for remand. Thereafter, Lexecon invoked that very authority, without express reservation, benefitted from it, and accepted a significant monetary benefit. *See, e.g., Rosen v. Rae*, 647 P.2d 640 (Ariz. App. 1982); *In Re Denney*, 135 F.2d 184, 186 (7th Cir.) *cert. denied sub nom. Denney v. Fort Recovery Banking Co.*, 320 U.S. 474 (1943); 4 *C.J.S.* Appeal & Error § 193 (1993). *See generally, Donovan v. Penn Shipping Co.*, 429 U.S. 648 (1977).

III

CERTIORARI SHOULD NOT BE GRANTED TO REVIEW A RULE 12(b)(6) DISMISSAL OF STATE LAW CLAIMS OF MALICIOUS PROSECUTION AND ABUSE OF PROCESS BECAUSE THE DISTRICT COURT TOOK JUDICIAL NOTICE OF UNDISPUTED PRIOR PROCEEDINGS AND ORDERS IN THE UNDERLYING CASE.

It is well established that, in considering a Rule 12(b)(6) motion, courts may take judicial notice of items of public record. *Papasan v. Allain*, 478 U.S. 265, 268, n. 1 (1986); *Shaw v. Hahn*, 56 F.3d 1128, 1129, n. 1 (9th Cir.), *cert. denied*, 116 S.Ct. 418 (1995); *Henson v. CSC Credit Serv.*, 29 F.3d 280, 284 (7th Cir. 1994); Wright & Miller, *Fed. Prac. & Proc.* § 1357, p. 299 (1990) and cases cited.

This accepted practice has particular application to claims for malicious prosecution and abuse of process since they are the result of prior legal proceedings. Matters of record may be dispositive of one or more elements of those claims. For example, if there is a judgment in favor of the plaintiff in the underlying case, it cannot reasonably be argued that the court in the second case should blind itself to that record fact and allow the second case to proceed. Under Lexecon's view, the second court would have to accept as true an allegation of favorable termination even if a judgment of record in the underlying case were to the contrary. As observed by the Court of Appeals, that contention elevates formalism beyond its proper place. It is also contrary to the policies of judicial economy, efficiency, and finality. *See Caterpillar, Inc. v. Lewis, supra; Montana v. U.S., supra.*

The District Court properly took judicial notice of the public record in *Lincoln Savings*, including law of the case orders that were ultimately merged into the final judgment (from which Lexecon did not appeal) and became *res judicata*. *See Montana v. U.S., supra,* 440 U.S. at 153. Those matters of record included Orders which had a direct bearing on elements of Lexecon's claim. For example, the claim that *Lincoln Savings* was terminated in Lexecon's favor was adjudicated false in the final Order of December 31, 1992.

Another example relates to the existence of probable cause for the *Lincoln Savings* claims against Lexecon. Probable cause is a question of law in Arizona, and also under a Noerr-Pennington immunity analysis. *Bradshaw v. State Farm*, 758 P.2d 1312, 1321 (Ariz. 1988); *Professional Real Estate v. Columbia Pictures*, 508 U.S. 49, 64-66 (1993). That issue of law is decided by judicial hindsight, not at the time the case is filed. *See, e.g., U.S.S. v. Posco Contra Costa County, etc.*, 31 F.3d 800, 810 (9th Cir. 1994). *Hufstedler Kaus & Ettinger v. Sup.Ct.*, 49 Cal. Rptr. 551, 556 (App. 1996).

Here, the record before Judge Roll was fully developed as to what evidence the *Lincoln Savings'* class was relying upon in its claims against Lexecon. There was no need for a trial to identify that evidence. Thus, the existence of probable cause was "purely one of law" (*Professional Real Estate, supra,* at 67, Souter, J., concurring), and properly decided on a Rule 12(b)(6) motion (*Ibid*).

Finally, if the record on appeal supports dismissal under Rule 56, a judgment of dismissal under Rule

12(b)(6) should be affirmed even if it were error to dismiss under Rule 12. *E.g., Hirrill v. Merriweather*, 629 F.2d 490, 495 (8th Cir. 1980). This is part of the accepted policy that an appellate court should affirm if the result is right even if the lower court ruled for the wrong reason. Any other rule would be contrary to the overriding policies of judicial economy, efficiency, and finality. *See generally, Caterpillar, Inc. v. Lewis, supra; Montana v. U.S., supra.*

CONCLUSION

The Petition for a Writ of *Certiorari* should be denied. If granted as to Petitioners' Question No. 1, it should be granted only with respect to the judgment after trial entered in favor of the Milberg Defendants since that question does not apply to the judgment obtained by pretrial motions by the Cotchett Defendants.

Respectfully submitted,

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Dated: April 17, 1997

APPENDIX 1

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

In re AMERICAN CONTINENTAL/LINCOLN SAVINGS & LOAN SECURITIES LITIGATION.	MDL Docket No. 834 CV 93-1087 PHX JMR
LEXECON INC. and DANIEL R. FISCHEL, Plaintiffs, vs. MILBERG WEISS BERSHAD HYNES & LERACH, et al., Defendants.	**ORDER** (Filed June 7, 1995)

The Court having previously granted summary judgment in favor of defendants Cotchett, Illston & Pitre, Joseph Cotchett, and Susan Illston, and there being no just reason for delay of entry of a final judgment in their favor pursuant to Rule 54(b), Federal Rules of Civil Procedure.

IT IS HEREBY ORDERED that plaintiffs' claims against said defendants **ARE DISMISSED WITH PREJUDICE.**

Dated this 2nd day of June, 1995.

/s/ John M. Roll
JOHN M. ROLL
United States
District Judge

APPENDIX 2

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

In re AMERICAN CONTINENTAL CORPORATION/LINCOLN SAVINGS & LOAN SECURITIES LITIGATION.	)	MDL Docket No. 834
LEXECON INC. and DANIEL R. FISCHEL, Plaintiffs, vs. MILBERG WEISS BERSHAD HYNES & LERACH, a partnership, *et al.*, Defendants.	)	No. CIV 93-1087 PHX JMR Hon. John M. Roll, *Judge Presiding*

NOTICE OF APPEAL

Notice is given that plaintiffs Lexecon Inc. and Daniel R. Fischel hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Order entered on November 29, 1993 granting in part the motion of defendants Cotchett, Illston & Pitre, Joseph Cotchett and Susan Illston to dismiss the Amended Complaint, the Order

entered on December 15, 1994 denying plaintiffs leave to file their proposed Second Amended Complaint, and the Order entered on April 24, 1995 granting the motion of defendants Cotchett, Illston & Pitre, Joseph Cotchett and Susan Illston for summary judgment on plaintiffs' remaining claims, all of which are final judgments with respect to defendants Cotchett, Illston & Pitre, Joseph Cotchett and Susan Illston as a result of the district court's entry of a Rule 54(b) certification on June 7, 1995.

Dated: July 3, 1995

Respectfully submitted,

/s/ A. Bates Butler III
One of the attorneys for
plaintiffs Lexecon Inc. and
Daniel R. Fischel

APPENDIX 3

[DOCKET SHEET EXCERPT]

On June 7, 1995 an order was entered granting the Cotchett defendants' motion for a certification of the judgment in their favor under Rule 54(b).

3. Issues Proposed To Be Raised On Appeal

Whether the district court erred in dismissing plaintiffs' abuse of process, malicious prosecution and several defamation claims under Rule 12(b)(6) and in refusing to permit plaintiffs to file a proposed Second Amended Complaint on the ground that it also failed to state a claim.

Whether the district court erred in granting summary judgment on the remaining claims for tortious interference, defamation, commercial disparagement and violation of the Illinois Consumer Fraud and Deceptive Practices Act.

Supreme Court, U.S.
FILED
APR 24 1997
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No. 96-1482

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

LEXECON INC., *et al.*,
Petitioners,
v.
MILBERG WEISS BERSHAD HYNES & LERACH, A PARTNERSHIP, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

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IN THE

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONERS' REPLY BRIEF

Respondent Milberg Weiss does not dispute that the Ninth Circuit decision at issue here raises a significant, recurring legal issue. It does not deny that "self-transfer" has become a commonplace aspect of multidistrict litigation, or that this "remarkable power grab" by the federal courts (Pet. App. 30a (Kozinski, J., dissenting)) has forced an enormous number of plaintiffs to go to trial in forums they would never have chosen. On the contrary, Milberg itself emphasizes the multitude of cases involving the same, purely legal question presented here. Milberg Opp. at 12-13 & n.6.

Milberg nevertheless contends that, because the lower courts are in agreement, this widespread practice does not merit the Court's attention. But, as Professor Wright explains, the federal courts obtain their authority by Act of Congress, not by "adverse possession." *Amicus* Br. of Charles Alan Wright at 8.

Unless, therefore, Milberg can demonstrate that self-transfer actually accords with the language of the relevant statutes, the very fact that the practice is so deeply entrenched provides an extraordinarily compelling basis for this Court's review. The Court has few duties more important than ensuring that the federal courts do not systematically ignore the limits that Congress has placed on their authority.

Although Milberg acknowledges that this case raises an abstract legal issue that turns on the "plain terms" of the relevant statutes (Milberg Opp. 15), it has failed utterly to come to grips with those plain terms or to raise any other concerns that would counsel against a grant of certiorari.[1]

1. As Judge Kozinski has remarked, "[i]t's hard to imagine a clearer statutory command" than the one contained in section 1407(a). Pet. App. 59a (Kozinski, J., dissenting). Section 1407(a) states that the Joint Panel on Multidistrict Litigation ("JPML") is empowered to transfer cases only for "coordinated or consolidated *pretrial* proceedings" and that such cases "*shall* be remanded" at the conclusion of such proceedings (emphasis added). The statute provides only one exception to this mandatory remand rule: cases need not be remanded where they "have been previously terminated." 28 U.S.C. § 1407(a).

Milberg seeks to create a second exception that appears nowhere in the statute—and that would swallow the rule. It argues that motions to change venue fall under the rubric of "consolidated or coordinated pretrial proceedings" and thus that section 1407 empowers transferee courts to "transfer" cases to themselves for all purposes, including trial. Milberg Opp. 15-16. But, as our petition made

[1] Respondents Joseph W. Cotchett, Susan Illston, and Cotchett Illston & Pitre have filed a separate opposition that, they admit, does not even address the primary question posed by the petition. *See* Cotchett Opp. 13 n.4. Instead, their opposition attempts to raise certain peripheral procedural issues that are irrelevant to the central legal question presented here. *See infra* p. 10 n.8.

clear (at 17-18)—in arguments to which Milberg hazards no response—such an understanding of the scope of the transferee court's authority would distort section 1407 beyond all recognition. It would turn Congress's unequivocal command that a case "shall be remanded" into a meaningless suggestion that the case "shall be remanded unless the transferee court decides it should not be." And it would allow transferee courts to bootstrap their carefully limited authority to conduct only "coordinated or consolidated pretrial proceedings" into a boundless license to hold onto a case for all purposes. Nothing in section 1407's plain language suggests that Congress understood that its clear directives could be so easily circumvented.[2]

Furthermore, the only statute that Milberg has cited as a source of authority for "self-transfer," 28 U.S.C. § 1404(a), plainly does not authorize that practice. Milberg contends that section 1404(a)'s reference to transfers to "any other district" means that a court may send the case to any court other than where the suit was brought. Milberg Opp. 17. But, other than labeling this reading as "natural," "straightforward," and "common-sens[ical]" (*id.*), Milberg provides no support for it at all.

And, in fact, this reading is untenable when section 1404(a) is read in full. That provision states: "For the convenience of parties and witnesses, in the interest of justice, *a district court* may transfer any civil action *to any other district or division* where it might have been brought" (emphasis added). The only interpretation of that language that makes any linguistic sense is that the

[2] Respondents persist in contending that only the JPML has a duty to remand, and that a transferee court is free to ignore this plain statutory directive. But, as our petition explains (at 17-18), the delegated authority of transferee courts cannot be broader than what section 1407(a) provides. Nor can the JPML broaden its powers (or avoid a clear statutory obligation) by delegating to transferee courts the authority to rule on remand motions in the first instance. Indeed, such a transparent dodge would eviscerate the mandatory remand requirement. Significantly, Milberg does not even attempt to counter these arguments.

"other district court" that may receive the case stands in contrast to the "district court" that "may transfer" it. Put differently, section 1404 contemplates that cases may be sent to any district in which venue would be proper "other" than the one where the case is currently pending. *See* Pet. App. 42a & n.9 (Kozinski, J., dissenting).

Moreover, Milberg never explains why section 1404, which was enacted decades before section 1407's passage even raised the possibility that a court would be in a position to "transfer" a case to itself, should be understood to authorize such a practice. *See* Pet. App. 42a (Kozinski, J., dissenting). As Professor Wright explains, "[a] 1948 statute cannot be given a meaning it could not have had when it was adopted in order to provide a result under a 1968 statute that Congress specifically considered and expressly rejected." *Amicus* Br. of Charles Alan Wright at 6.[3]

2. When Lexecon sought mandamus relief on the self-transfer issue from the Ninth Circuit, Milberg claimed that such relief should be denied because Lexecon could seek review of that issue after final judgment. Milberg was unequivocal on this point: "[*T*]*here is no question*

[3] Unable to ground any serious arguments in the statutory language, Milberg relies on the same statements from the legislative history torn from context and quoted by the Ninth Circuit. We have already shown (Pet. at 12-13 & n.2) that, in fact, Congress made abundantly clear that transferee courts would have *no* authority to oversee "trial proceedings" unless and until "amendments to the present language" were made. H.R. Rep. No. 1130, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. 1898, 1902. Milberg never grapples with that directly relevant statement or, for that matter, with the other, similarly clear evidence of Congress's understanding on this point. *See id.* at 1900, 1901 (proposed statute "does not . . . include the trial of cases in the consolidated proceedings" and would "not affect the place of trial in any case"). *See also Amicus* Br. of Charles Alan Wright at 4 ("The legislative history is unambiguous. Congress knew that it was authorizing transfer for pretrial proceedings only and that when those proceedings were ended, the case was to be remanded to the transferor court.").

that Lexecon can seek review of the order changing venue following final judgment."[4]

Milberg has now done an abrupt about-face. It now claims that the self-transfer decision is completely unreviewable after final judgment, and thus that this Court is powerless to stop the federal judiciary's concerted disregard of the plain language of a federal statute. That new-found position is as wrong as it is opportunistic.

Milberg rests its argument on two premises: (1) that trial occurred in a forum where the case could have been brought and (2) that no showing of prejudice has been made. Milberg Opp. 22. Neither assumption has any relevance to this case.

First, although this case *could* have been brought in Arizona, the crucial point is that Lexecon, exercising its deeply-rooted right to select the forum, chose not to do so. It brought suit instead in its home district. And, when the case was sent to Arizona under section 1407, that court had authority only to conduct *pretrial* proceedings. The Arizona court had no legal authority at all to conduct a trial. Put differently, venue for the trial in Arizona was unlawful and in derogation of the express rights that Congress has granted to multidistrict plaintiffs like Lexecon.

In such a circumstance—where a party had been forced to have its case resolved in an improper venue—this Court has not hesitated to conclude that reversal is required, whether or not "prejudice" has been shown. *Olberding v. Illinois Century R.R.*, 346 U.S. 338, 340 (1953) ("[U]nless the defendant has also consented to be sued in that district, he has a right to invoke the protection

[4] Milberg Defendants' Response in Opposition to Petitioners' Motion for a Stay of District Court Proceedings Pending a Decision on their Petition for Writ of Mandamus at 8 (emphasis added). The Ninth Circuit relied on this same argument in denying mandamus. Pet. App. 56a ("[W]e are not satisfied that petitioners cannot attain the relief they request on direct appeal.").

which Congress has afforded him. The requirement of venue is specific and unambiguous; it is not one of those vague principles which, in the interest of some overriding policy, is to be given a 'liberal' construction."). *See also Schnell v. Peter Eckrich & Sons, Inc.*, 365 U.S. 260, 264 (1961) (rejecting argument that application of venue statute "exalts form over substance"); *Leroy v. Great Western United Corp.*, 443 U.S. 173, 184-85 & n.18 (1979).[5] Thus, as Milberg previously emphasized (when it was to its benefit), there is nothing at all unusual about seeking—and obtaining—reversal after trial where Congress has not authorized venue in the court below.

In any event, Milberg's claim that Lexecon has suffered no prejudice here blinks reality. Lexecon was dragged thousands of miles from home and forced to trial in a forum where "there was much popular feeling against Lincoln Savings, Charles Keating, and those (like [Lexecon]) who were associated with them." Pet. App. 47a (Kozinski, J., dissenting). Milberg exploited this unlawfully obtained advantage to the hilt. Its trial presentation repeatedly highlighted Lexecon's alleged relationship with Charles Keating. *See* Pet. App. 47a n.15 (Kozinski, J., dissenting) (describing how Milberg's counsel "peppered his arguments with references to Charles Keating's misdeeds and [respondents'] attempts to recover money for the victims"). Milberg's claim that the Court should deny review because there was no harm thus rings hollow.

Nor does the Court's recent ruling in *Caterpillar, Inc. v. Lewis*, 117 S. Ct. 467 (1996), counsel against granting review in this case. *Caterpillar* had nothing at all to do with venue, and it did not discuss, much less limit, *Olberding*'s unequivocal holding that reversal is proper when statutory venue requirements are violated. It thus has no relevance here.

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[5] *Accord Cottman Transmission Sys., Inc. v. Martino*, 36 F.3d 291, 297 (3d Cir. 1994); *Gogolin & Stelter v. Karn's Auto Imports, Inc.*, 886 F.2d 100, 104 (5th Cir. 1989), *cert. denied*, 494 U.S. 1031 (1990); *United States v. Maryland Casualty Co.*, 573 F.2d 245, 248-49 (5th Cir. 1978).

In any event, the *Caterpillar* Court decided that a new trial was not warranted because (1) the jurisdictional flaw that existed at the time of a removal from state court had been "cured" by the time of final judgment and (2) the end result in the case was consonant with the relevant Congressional policy in favor of efficiency and economy. *See id.* at 476-77. Neither point holds true here.

Unlike the removal statutes at issue in *Caterpillar*, section 1407 is all about authorizing *limited* transfers and ensuring plaintiffs of their right to trial in their chosen forum. When a trial is held in an improper district, that clear statutory rule is violated and nothing that occurs afterwards can "cure" that breach. Moreover, under no theory is the result in this case "in harmony" with the relevant Congressional policy. *Id.* Congress chose to preserve plaintiff's forum rights even at the expense of some inefficiency. If this Court were to allow this judgment to stand in the name of "finality, efficiency, and economy," as Milberg suggests (Opp. 23), it would be subverting the very policy choices that are at the heart of section 1407. Nothing in *Caterpillar* provides any support for such an improper outcome.

Indeed, *Caterpillar* demonstrates why the Court should grant review here. In *Caterpillar*, the Court stressed that its result was grounded in the assurance that there was no danger that the lower courts "generally will not comprehend, or will balk at applying, the rules on removal." *Caterpillar*, 117 S. Ct. at 477. This case, by contrast, involves decades of *demonstrated* disregard for a clear statutory mandate. That systemic violation of Congressional will demands correction by this Court.

3. Milberg makes one other attempt to deflect the Court's attention from the significant legal issue squarely presented here. It alleges that Lexecon has somehow waived its objections to the Arizona court's self-transfer action. That argument is meritless.

As the petition explains (at 18 n.4), Lexecon followed proper procedure to the letter in seeking relief on this

issue. The JPML's own rules instruct litigants to seek a remand, in the first instance, from the transferee court. JPML Rule 14(d). Lexecon accordingly moved the Arizona court to remand the case to Illinois. That court initially held the matter in abeyance, so Lexecon renewed its request. The Arizona court then denied Lexecon's motion and simultaneously transferred the case to itself, which, under the JPML's rules, *deprived* that body of all jurisdiction over the remand issue. *See* JPML Rule 14(b). *Contrast* Milberg Opp. 25 (suggesting, without support, that Lexecon could have sought a remand from the JPML after the self-transfer decision).

Accordingly, Lexecon challenged the separate self-transfer decision through all available means—first on mandamus and then on direct review of the final judgment. As Judge Kozinski explained, any attempt to "fault[]" Lexecon for "following the JPML rules" in its extensive attempts to obtain relief on these questions is a "sucker-punch" (Pet. App. 32a n.1)—especially in light of Milberg's prior acknowledgment that there was "no question" that this issue could be addressed after final judgment.

In any event, there is no dispute that the Ninth Circuit reached the merits of the issue Lexecon presents here. In such a circumstance, this Court has not hesitated to grant review of significant federal questions presented by a case, regardless of any claim of prior procedural error by the petitioner. *See, e.g., Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991); *Stevens v. Department of Treasury*, 500 U.S. 1, 8 (1991); *St. Louis v. Praprotnik*, 485 U.S. 112, 120-121 (1988).

4. Finally, Milberg dismisses Lexecon's second question as not certworthy. But it is evident that the complaint in this case, if taken as true, presented issues of considerable importance involving the very kinds of abuse of the judicial system by prominent class action securities

lawyers that Congress has condemned.[6] Those issues have never been decided because the Ninth Circuit, rejecting established practice as mere "formalism," looked to dubious "public record" materials to resolve *disputed fact* issues at the motion to dismiss stage. That result directly conflicts with the decisions of other courts of appeals, which have carefully limited the use of public records to instances where the issue is so clear it would be subject to judicial notice. *See, e.g., Friedman v. United States*, 927 F.2d 259, 261 (6th Cir. 1991); *Lovelace v. Software Spectrum Inc.*, 78 F.3d 1015, 1017-18 (5th Cir. 1996); *Winchester Homes, Inc. v. Osmose Wood Preserving, Inc.*, 37 F.3d 1053, 1054 (4th Cir. 1994).

Respondents make no attempt to distinguish those cases.[7] Instead, they seek to shoehorn the Ninth Circuit's remarkable ruling into established practice. That attempt must fail. There can be no dispute here that Lexecon's complaint alleged that Milberg brought its *Lincoln Savings* claim against Lexecon for improper reasons and that *Lincoln Savings* resulted in a termination favorable to Lexecon. The Ninth Circuit conclusively rejected those *factual* contentions at the motion to dismiss stage because it relied on an "order" by a recused judge who gave factual testimony about off-the-record events without being subject to cross-examination. Respondents provide no authority suggesting that the *factual* characterizations contained in that "order" are entitled to such controlling weight at the motion to dismiss stage that contrary allega-

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[6] Milberg's opposition is studded with inflammatory accusations leveled at Lexecon. Those statements are uniformly untrue and, even more important for present purposes, contradict the allegations in Lexecon's complaint. The whole point of Rule 12(b)(6) is that the plaintiff is entitled to an opportunity to prove such allegations. Lexecon was denied that opportunity here.

[7] The one case from this Court that respondents cite, *Papasan v. Allain*, 478 U.S. 265 (1986), involved historical facts that were "*not* disputed." *Id.* at 268 n.1 (emphasis added). It thus provides no support for their position.

tions contained in a well-pleaded complaint may properly be ignored. *Contrast Friedman*, 927 F.2d at 261 (refusing to take notice of facts in prior opinion at motion to dismiss stage). Accordingly, they have done nothing to diminish either the circuit conflict or the significant issues regarding core procedural protections for plaintiffs raised by the Ninth Circuit's ruling.[8]

CONCLUSION

The petition for a writ of certiorari should be granted.

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Counsel for Petitioners

April 25, 1997

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[8] Milberg takes issue with our argument that the Court need not address the 12(b)(6) issue if it reverses on the first question. It is well-established, however, that, so long as a decision is interlocutory, it is subject to change by the court that has jurisdiction over the case, *see* Fed. R. Civ. P. 54(b) (orders are "subject to revision at any time before the entry of judgment"), and subject to review on appeal from a final judgment. The same point disposes of the entire brief of the Cotchett respondents. The Arizona court did not "terminate" their case by entering final judgment until after all pretrial proceedings were complete, and after it had lost authority to rule. Accordingly, their case would still be open on remand. In any event, the proper posture of the case on remand is something that can be determined on remand, and need not distract this Court from the purely legal issues presented here.

No. 96-1482

Supreme Court, U.S.
FILED
JUL 3 1997
OFFICE OF THE CLERK

IN THE
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Petitioners,
v.
MILBERG WEISS BERSHAD HYNES & LERACH, A PARTNERSHIP, *et al.*
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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JOINT APPENDIX

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RELEVANT DOCKET ENTRIES

Date	Entry No.	PROCEEDINGS
1/25/92	1	COMPLAINT; jury demand—Civil cover sheet—Appearance(s) of Bettina Getz, Steven Ross Gilford, Vincent J. Connelly, Michele Odorizzi, Alan Norris Salpeter, Marcia Cotler, Gary S. Feinerman as attorney(s) for plaintiff Lexecon Inc., plaintiff Daniel R. Fischel with Rule 39 affidavits
6/7/93	122	MDL-ORDER pursuant to order of MDL Panel, this action is transferred into this district and is assigned to the Honorable Judge Roll and is to be consolidated with MDL-90-834
6/7/93	123	Original file, certified copy of transfer order and docket sheet received from USDC Northern District of Illinois
6/15/93	127	AMENDED COMPLAINT by plaintiffs (all)
7/2/93	130	MOTION to dismiss by Milberg Weiss defendants and for sanctions by Milberg Weiss defendants
7/13/93	137	MEMORANDUM IN SUPPORT by Milberg Weiss defendants in support of their motion to dismiss and motion for sanctions
7/13/93	139	REPLY by Milberg Weiss defendants in support of their motion to dismiss and motion for sanctions
7/13/93	140	APPENDIX to reply memorandum in support of Milberg Weiss defendants' motion to dismiss
11/29/93	169	CERTIFIED COPY OF ORDER by Judge John M. Roll that defendants' joint and individual motions to dismiss are GRANTED IN PART and Count 1 and 2 of plaintiffs' mandated complaint are DISMISSED. Defendants' joint and individual motions to

Date	Entry No.	PROCEEDINGS
		dismiss Count 4 are GRANTED IN PART. In all other respects, defendants' joint and individual motions are DENIED
12/28/93	177	MOTION for summary judgment by defendant Kevin P. Roddy
12/28/93	178	MEMORANDUM by defendant Kevin P. Roddy in support of his motion for summary judgment
12/28/93	180	JOINDER by defendant Milberg Weiss to defendant Roddy's motion for summary judgment
12/28/93	181	MOTION for summary judgment by defendant Milberg Weiss
12/28/93	182	MEMORANDUM by defendant Milberg Weiss in support of their motion for summary judgment with exhibits
1/7/94	185	PRELIMINARY RESPONSE to motions for summary judgment by plaintiff Lexecon and Daniel R. Fischel and CROSS-MOTION pursuant to Rule 56(f) to stay further briefing pending discovery by plaintiffs Lexecon and Fischel
1/13/94	186	MOTIONS for summary judgment by defendants Cotchett Illston, Joseph Cotchett and Susan Illston
1/24/94	189	RESPONSE by defendant Kevin P. Roddy in opposition to motion pursuant to Rule 56(f) to stay further briefing pending discovery by plaintiffs Lexecon & Fischel
1/24/94	190	RESPONSE by defendant Milberg Weiss in opposition to motion pursuant to Rule 56(f) to stay further briefing pending discovery by plantiffs Lexecon & Fischel

Date	Entry No.	PROCEEDINGS
1/26/94	191	JOINDER by defendants Cotchett Illston, Joseph Cotchett and Susan Illston in opposition to plaintiffs' Rule 56(f) motion
1/27/94	192	ORDER by Judge Roll granting motion pursuant to Rule 56(f) to stay further briefing pending discovery by plaintiffs Lexecon & Fischel; period for discovery will close 7/13/94. Plaintiffs' opposition to defendants' pending motion for summary judgment and all other dispositive motions must be filed by 8/12/94; hearing set for 3/28/94 is VACATED. . . discovery due 7/13/94; dispositive motions due 8/12/94; plaintiffs' motion to produce documents submitted for in camera inspection is GRANTED; all pending motions for reconsideration of this Court's order dated 11/29/93 are DENIED. . . see document for full details
3/7/94	206	ANSWER AND COUNTERCLAIM; jury demand by defendant Milberg Weiss against plaintiffs Lexecon Inc. and Daniel R. Fischel
3/8/94	207	ANSWER by defendants Cotchett Illston, Joseph Cotchett & Susan Illston to amend complaint
3/24/94	213	AMENDED ANSWER by Milberg Weiss defendants; jury demand
3/24/94	213	AMENDED COUNTERCLAIM by Milberg Weiss defendants
3/25/94	211	ORDER by Judge Roll granting motion for Rule 16 discovery conference by defendant Milberg Weiss; that defendants' motion for imposition of the New Rules of FRCP is denied; defendants' motion for complex case designation is granted; that defendants are to produce all documents identified by this court in its order of 1/27/94 no later than

Date	Entry No.	PROCEEDINGS
		3/25/94; defendant's claim of privilege log is denied; defendants' motion in limine are denied as premature; defendant's motion for limitation on scope of discovery is denied; defendants' oral motion to request plaintiffs to replead their complaint is denied; the oral motion to extend discovery is granted; discovery deadline re-set for 9/16/94; the transcript of 3/21/94 is SEALED. . . see document for full details
7/7/94	254	MINUTE ENTRY Judge Initials: JMR Court Reporter: John Davis, defendant. motion to compel production of documents by Milberg Weiss defendants is GRANTED to extent that plaintiff must produce documents prepared prior to date of settlement in Shields litigation; Motion to Compel Production Centrust Document MOOT; Motion to Compel Standard Chartered Document UNDER ADVISEMENT pending submission of deposition testimony; Motion to Strike and Sanctions is DENIED
7/20/94	271	ORDER by Judge Roll that defendant Milberg Weiss' motion to compel is GRANTED. Disclosure shall occur within 30 days of the date of this order
7/20/94	272	ORDER by Judge Roll granting in part and denying in part motion for reconsideration by plaintiff Lexecon, denying motion to clarify by plaintiff Lexecon
8/9/94	288	MOTION to refer the case back to the MDL Panel for remand to the Northern District of Illinois by plaintiffs (all)
8/9/94	289	MOTION for leave to file second amended complaint by plaintiffs (all) * * * FILED UNDER SEAL * * *

Date	Entry No.	PROCEEDINGS
8/23/94	307	MOTION to stay consideration of plaintiff's MDL remand motion by defendant Milberg Weiss
8/23/94	308	MEMORANDUM IN SUPPORT by defendant Milberg Weiss of motion to stay consideration of plaintiff's MDL remand motion by defendant Milberg Weiss
8/23/94	309	OPPOSITION to plaintiff's motion to refer for remand by defendant Cotchett Illston, defendant Joseph Cotchett, defendant Susan Illston and CROSS-MOTION to transfer case by defendant Cotchett Illston, defendant Joseph Cotchett, defendant Susan Illston
8/23/94	310	EXHIBITS in support of opposition to motion to refer for remand, cross-motion
8/26/94	311	ORDER by Judge John M. Roll granting motion to stay consideration of plaintiff's MDL remand motion by defendant Milberg Weiss, denying motion to set accelerated briefing and hearing schedule for Greenfield & Chimicles' motion for summary judgment
8/26/94	315	OPPOSITION by defendant Greenfield Chimicles to motion to refer the case back to the MDL Panel for remand to the Northern District of Illinois by plaintiff
8/29/94	321	REPLY Memo by plaintiff (all) in support of their motion to refer the case back to the MDL Panel for remand to the Northern District of Illinois by plaintiffs (all)
9/1/94	328	MOTION for reconsideration of Court's ruling of 8/24/94 by plaintiff
9/16/94	343	MOTION for recusal by plaintiff Lexecon

Date	Entry No.	PROCEEDINGS
9/21/94	346	ORDER by Judge Roll that plaintiffs are to conduct a reasonable inquiry, to include information readily available to them at this stage of discovery, and to answer request for admissions within 10 days of this order; granting in part and denying in part motion to compel by Cotchett Illston defendants
9/30/94	361	RESPONSE by defendant Milberg Weiss in opposition to motion for recusal by plaintiff Lexecon * * * * FILED UNDER SEAL * * * *
10/7/94	369	REPLY by plaintiffs (all) in support of motion for recusal by plaintiff Lexecon * * * * FILED UNDER SEAL * * * *
10/24/94	378	ORDER by Judge John M. Roll denying motion to compel production of documents withheld on purported attorney-client privilege grounds by Milberg Weiss defendants; denying motion to compel deposition testimony of Thomas Frederick by Milberg Weiss defendants; denying motion to exceed the page limitation by plaintiff
10/25/94	383	MOTION to quash subpoena by Richard M. Bilby for protective order by Richard M. Bilby
10/25/94	384	MOTION to strike the name of lead trial counsel from Lexecon's list of percipient witnesses by defendant Milberg Weiss
10/25/94	385	MEMOORANDUM IN SUPPORT by defendant Milberg Weiss of motion to strike the name of lead trial counsel from Lexecon's list of percipient witnesses by defendant Milberg Weiss * * * * FILED UNDER SEAL * * * *

Date	Entry No.	PROCEEDINGS
10/27/94	386	MOTION to vacate deposition by Richard M. Bilby
10/28/94	394	MEMORANDUM IN OPPOSITION by plaintiff Lexecon of motion to vacate deposition by Richard M. Bilby
10/31/94	405	MINUTE ENTRY Judge Initials: JMR Court Reporter: Chris Wright Telephone Hearing held regarding Motion to Quash Subpoena of RMB and Motion for Recusal. Deposition of RMB postponed until matter briefed and argued. Simultaneous briefs due 11/7/94. Telephone argument 11/16/94 at 8:30 a.m. See Order from Court regarding Motion for Recusal
11/2/94	399	ORDER by Judge John M. Roll denying motion for recusal by Plaintiff Lexecon
11/4/94	409	RENEWED MOTION to refer the case back to the Judicial Panel on MDL for remand to the Northern District of Illinois by plaintiff Lexecon Inc.
11/7/94	415	MEMORANDUM IN OPPOSITION by plaintiff Lexecon to motion to quash subpoena by Richard M. Bilby * * * * FILED UNDER SEAL * * * *
11/7/94	418	MEMORANDUM IN SUPPORT by defendant Milberg Weiss of motion to quash subpoena by Richard M. Bilby
11/16/94	430	MINUTE ENTRY Judge Initials: JMR court Reporter: Chris Wright Telephone Hearing held regarding Motion to Quash Subpoena. Court grants motion to quash subpoena by Richard M. Bilby, grants motion for protective order by Richard M. Bilby. ORDERED, attorney James Maguire is to file a notice with the Court under seal regarding subject matter discussed on the record within two weeks of receipt of this Minute Entry.

Date	Entry No.	PROCEEDINGS
11/21/94	443	SEPARATE RESPONSE by Cotchett Illston defendants to motion to refer the case back to the Judicial Panel on MDL for remand to the Northern District of Illinois by plaintiff Lexecon Inc.
11/21/94	444	SEPARATE RESPONSE to motion by defendant Greenfield Chimicles and CROSS-MOTION for removal to Arizona by defendant Greenfield Chimicles * * * FILED UNDER SEAL * * *
11/29/94	451	ORDER by Judge John M. Roll granting stipulation that Ernst & Young may file its response to Milberg Weiss' motion to compel production to compel production of documents listed on Ernst & Young's Log on or before 11/28/94 and that Milberg Weiss defendants shall have until 12/5/94 to file reply. . . see document for full details
11/29/94	452	ORDER by Judge John M. Roll granting in part and denying part motion to compel responses to discovery requests by Milberg Weiss defendants, granted as to interrogatories seeking information relating to the alleged tortious acts for which Lexecon seeks relief and Lexecon's witness information. Plaintiff is directed to answer interrogatories within 15 days of this order; denying motion for leave to retain and use documents allegedly produced inadvertently * * * * FILED UNDER SEAL * * * * by Milberg Weiss defendants granting motion for leave to file first amended counterclaims by Milberg Weiss defendants * * * * FILED UNDER SEAL * * * * granting in part and denying in part motion to compel production of documents and information by Milberg Weiss defendants by plaintiff *FILED UNDER

Date	Entry No.	PROCEEDINGS
		SEAL*; denying motion for reconsideration of Court's ruling of 8/24/94 by plaintiffs (all); telephonic hearing scheduled for 2:00 11/30/94 regarding issues relating to various Milberg Weiss motions to compel production. . . see document for full details
11/29/94	457	RESPONSE by defendant Milberg Weiss in opposition to motion to refer the case back to the Judicial Panel on MDL for remand to the Northern District of Illinois by plaintiff Lexecon Inc.
12/6/94	465	ORDER by Judge John M. Roll that motion to compel responses to discovery requests by Milberg Weiss defendants is granted in that Lexecon is ordered to produce the requested documents in existence up to-date that 7/87 report of Lexecon was submitted. Lexecon submits any other documents concerning Michael Milken, Drexel and Ivan Boesky which reflect Lexecon's pre-July 87' knowledge of activities of Michael Milken, Drexel and Ivan Boesky. In all other respects, motion to produce is DENIED. FO: granting motion to compel deposition testimony concerning Milken, Drexel and Boesky by Milberg Weiss defendants * * * * FILED UNDER SEAL * * * *; denying motion to compel production of documents and deposition testimony from Michael Milken by Milberg Weiss defendants; denying motion to compel production of documents from Paul Weiss by defendant Milberg Weiss
12/06/94	468	REPLY Memo by plaintiff Lexecon in support of their motion to refer the case back to the Judicial Panel on MDL for remand to the Northern District of Illinois by plaintiff Lexecon Inc.

Date	Entry No.	PROCEEDINGS
12/13/94	474	ORDER by Judge John M. Roll granting in part motion for clarification by defendants Milberg Weiss * * * * FILED UNDER SEAL * * * *. The Court's order of 11/28/94 is hereby clarified to the extent that it was not the Court's intent to compel disclosure now of any documents not previously requested by Lexecon during discovery; denying motion to strike Lexecon's corrected response to Milberg Weiss' motion to take deposition of certain unavailable third-party witnesses after the discovery cutoff by defendants Milberg Weiss; Lexecon may respond to the issue of where disclosure ought to take place, included in Milberg Weiss' motion for clarification, should that issue continue to remain unresolved
12/13/94	477	MOTION to dismiss amended counterclaim of Milberg Weiss by plaintiff Lexecon
12/14/94	478	REPLY by defendant Greenfield Chimicles in support of motion for removal to Arizona by defendants Greenfield Chimicles
12/15/94	480	ORDER by Judge John M. Roll granting motion to strike the name of lead trial counsel from Lexecon's list of percipient witnesses by defendant Milberg Weiss
12/15/94	481	ORDER by Judge John M. Roll denying motion for leave to file second amended complaint by plaintiffs (all)
12/19/94	485	SUPPLEMENTAL FILING by plaintiff Lexecon of additional authority in support of their renewed motion to refer the case back to the judicial panel on MDL for remand to the Northern District of Illinois
12/21/94	487	MOTION for transfer to this District by Milberg Weiss defendants

Date	Entry No.	PROCEEDINGS
12/22/94	491	ORDER by Judge Roll granting in part and denying in part motion to compel production of documents and deposition testimony by defendant Milberg Weiss; granting motion for leave to retain and use Milken documents allegedly produced inadvertently by Milberg Weiss defendants * * * * FILED UNDER SEAL * * * *; granting in part and denying in part motion to compel Rule 30(b)(6) deposition of Lexecon by defendant Milberg Weiss . . . see document for full details
12/27/94	493	MEMORANDUM IN SUPPORT by Milberg Weiss defendants in support of motion for transfer to this District of Milberg Weiss defendants
1/4/95	495	ORDER by Judge John M. Roll granting in part motion for leave to continue the depositions of David Paul and Charles Keating Jr. after their criminal proceedings are concluded by defendant Milberg Weiss; granting motion to take depositions of certain unavailable third-party witnesses after the discovery cutoff; granting in part motion to compel production of documents listed on Ernst & Young's Log by defendant Milberg Weiss. . . see document for full details
1/6/95	496	RESPONSE Memo by plaintiff Lexecon in opposition to motion for transfer to this District by Milberg Weiss defendants
1/18/95	506	RESPONSE Memo by defendant Milberg Weiss in opposition to motion to dismiss amended counterclaim of Milberg Weiss by plaintiff Lexecon
1/24/95	511	MEMORANDUM IN OPPOSITION by plaintiffs (all) to defendants' motions for summary judgment

Date	Entry No.	PROCEEDINGS
1/24/95	515	REPLY by defendant Milberg Weiss in support of motion for transfer to this District by Milberg Weiss defendants
1/26/95	516	ORDER by Judge John M. Roll that Ernst & Young disclose to Milberg Weiss counsel the memo authored by Miles Ruthberg dated 10/5/89, and Steve Miller, dated 7/31/90 (both copies). Milberg Weiss counsel are directed not to disclose these documents to Milberg Weiss without prior court approval or written stipulation by Ernst & Young
2/6/95	525	MOTION for preliminary injunction by defendant Milberg Weiss and for permanent injunction by defendant Milberg Weiss
2/6/95	526	MEMORANDUM IN SUPPORT by defendant Milberg Weiss of motion for preliminary injunction by defendant Milberg Weiss * * * * FILED UNDER SEAL * * * *
2/14/95	534	REPLY by defendant Kevin P. Roddy in suport of motion for summary judgment by defendant Kevin P. Roddy * * * * FILED UNDER SEAL * * * *
2/14/95	535	JOINDER by defendant Milberg Weiss in defendant Roddy's reply memo in support of his motion for summary judgment
2/14/95	537	REPLY MEMO by defendant Milberg Weiss in support of their motion for summary judgment regarding proposed sixth amended complaint by defendant Milberg Weiss
2/14/95	538	APPENDIX to Milberg Weiss defendants' reply memo regarding summary judgment * * * * FILED UNDER SEAL * * * *
2/17/95	544	MOTION for summary judgment on all remaining claims by defendant Milberg Weiss

Date	Entry No.	PROCEEDINGS
2/17/95	545	APPENDIX to Milberg Weiss defendants' motion for summary judgment on all remaining claims Vol. I & II
2/24/95	549	MEMORANDUM IN SUPPORT by defendant Milberg Weiss of motion for summary judgment on all remaining claims by defendant Milberg Weiss * * * * FILED UNDER SEAL * * * *
3/10/95	561	ORDER by Judge John M. Roll denying motion for preliminary injunction by defend ant Milberg Weiss, denying motion for permanent injunction by defendant Milberg Weiss. . . see document for full details
3/20/95	567	RESPONSE by plaintiff Lexecon in opposition to motion for summary judgment on all remaining claims by defendant Milberg Weiss * * * * FILED UNDER SEAL * * * *
4/3/95	576	JOINDER by defendant Cotchett Illston in Milberg Weiss defendants' motion for summary judgment on remaining claims
4/5/95	579	REPLY MEMO by defendant Milberg Weiss in support of motion for summary judgment on all remaining claims by defendant Milberg Weiss * * * * FILED UNDER SEAL * * * *
4/7/95	581	NOTICE OF APPEAL by defendant Milberg Weiss, defendant Patrick Coughlin, defendant William S. Lerach, defendant Kevin P. Roddy, defendant Leonard B. Simon, defendant Melvyn I. Weiss, defendant Patricia Hynes, defendant Stephen Steinberg, defendant Michael C. Spencer from District Court Order
4/24/95	582	ORDER by Judge John M. Roll granting motion for summary judgment on all remaining claims by defendant Milberg Weiss, granting

Date	Entry No.	PROCEEDINGS
		motion to dismiss amended counterclaim Milberg Weiss by plaintiff Lexecon, granting motion for summary judgment by defendants Cotchett Illston, Joseph Cotchett and Susan Illston, granting motion for summary judgment by defendant Milberg Weiss, granting in part and denying in part motion for summary judgment by defendant Kevin P. Roddy
5/5/95	586	ORDER by Judge John M. Roll denying motion for sanctions re: discovery orders by defendant Milberg Weiss, denying motion to strike Milberg defendants' amended response to plaintiffs' second set of interrogatories, No 3 directed to all defendants by plaintiff Lexecon Inc. granting motion for transfer to this District by Milberg Weiss defendants denying motion to refer the case back to the Judicial Panel on MDL for remand to the Northern District of Illinois by plaintiff by plaintiff Lexecon Inc.
5/17/95	591	ORDER by Judge John M. Roll denying motion for a stay of all proceedings pending a decision on their petition for a writ of mandamus by Lexecon
5/18/95		Notification by 9CCA of Appellate Docket Number 95-15759
5/24/95	597	MOTION to dismiss remaining claim of palintiff Fischel by Milberg Weiss
5/24/95	598	MOTION to dismiss all individual defendants besides Roddy from this case by Milberg Weiss
6/7/95	602	ORDER by Judge Roll that plaintiffs' claims against said defendants are dismissed with prejudice; dismissing defendants Susan Illston, Joseph Cotchett and Cotchett Illston

Date	Entry No.	PROCEEDINGS
7/3/95	634	NOTICE of Interlocutory Appeal by Lexecon Inc., Daniel R. Fischel from District Court order
6/13/95	608	MEMORANDUM by defendant Milberg Weiss concerning dismissal of claims against defendants aside from Roddy
6/15/95	610	MOTION for order dismissing plaintiff Fischel from the case by defendant Milberg Weiss
6/20/95	612	MUTUAL RELEASE AND SETTLEMENT AGREEMENT between and among Lexecon, Fischel and Greenfield & Chimicles by defendant Greenfield Chimicles
6/27/95	617	MOTION for order dismissing claims against defendants Patricia Hynes, Michael Spencer and Stephen Steinberg by defendant Milberg Weiss
7/6/95	626	ORDER by Judge John M. Roll that Lexecon's claim arising from the mailing of Roddy's letter to the National Law Review will proceed to trial only as to Kevin P. Roddy and the Milberg Weiss firm. As to all defendants, this claim is dismissed; that plaintiff Fischel is dismissed as plaintiff; that ill will evidence will be admitted at trial only to the extent that Roddy was aware of these incidents before he mailed the letter to the National Law Journal. This evidence may also be admissible for impeachment purposes to the extent that participants in these ill will occurrences are called to testify on behalf of defendant Roddy or the Milberg Weiss firm; dismissing defendants Michael C. Spencer, Stephen Steinberg, Patricia Hynes, Melvyn I. Weiss, Leonard B. Simon, William S. Lerach, Patrick Coughlin, Greenfield Chimicles, and plaintiff Daniel R. Fischel

Date	Entry No.	PROCEEDINGS
7/28/95	653	Certified Copy of 9CCA Order re 95-70380; petition for writ of mandamus is denied; motion to stay is denied as moot
8/1/95	681	Jury Verdict: We the jury, duly empaneled and sworn find in favor of the following party . . . . we find in favor of Kevin Roddy and Milberg Weiss and against Plaintiff Lexecon
8/7/95	684	JUDGMENT: the jury finds in favor of defendants Kevin Roddy and Milberg Weiss and against Plaintiff Lexecon. It is hereby ordered that judgment is entered in accordance with jury verdict and that this case is dismissed, terminating case
8/9/95	688	NOTICE OF APPEAL by plaintiff Lexecon Inc., plaintiff Daniel R. Fischel from District Court final judgment, as well as, from all non-final orders entered prior to final judgment
9/1/95	703	NOTICE OF CROSS-APPEAL by Milberg defendants from District Court judgment, order
1/28/97	714	COPY of 9CCA Mandate re affirming the decision of the District Court, re: 95-16754; affirming the decision of the District Court, re: 95-16595; affirming the decision of the District Court, re: 95-16403; affirming the decision of the District Court, re: 95-15759

June 3, 1993

Docket No. 834

BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE AMERICAN CONTINENTAL CORPORATION/LINCOLN SAVINGS AND LOAN SECURITIES LITIGATION

N.D. Illinois, C.A. No. 1:92-CV-7768

LEXECON, INC. *et al.*

v.

MILBERG WEISS BERSHAD SPECTHRIE & LERACH, *et al.*,

Before JOHN F. NANGLE, Chairman, MILTON POLLACK, ROBERT R. MERHIGE, JR., WILLIAM B. ENRIGHT, CLARENCE A. BRIMMER, JR., JOHN F. GRADY, and BAREFOOT SANDERS, Judges of the Panel

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TRANSFER ORDER

Before the Panel is a motion by the Milberg Weiss Bershad Specthrie & Lerach defendants in the above-captioned action (*Lexecon*) to transfer, pursuant to 28 U.S.C. § 1407, *Lexecon* to the District of Arizona for coordinated or consolidated pretrial proceedings with the previously centralized actions in this docket. All *Lexecon* defendants join in the motion. The *Lexecon* plaintiffs oppose transfer.

On the basis of the papers filed and the hearing held, the Panel finds that *Lexecon* shares common questions of

fact with previously centralized actions in MDL-834 and that transfer of this action to the District of Arizona will best serve the convenience of the parties and witnesses and promote the just and efficient conduct of this litigation. Specifically, these actions share questions of fact with an as yet unapproved settlement involving Touche Ross, Lexecon, Inc. and the investor plaintiffs in the Lincoln Savings investor class actions in MDL-834. Centralization under Section 1407 is thus desirable in order to prevent inconsistent pretrial and appellate rulings, avoid duplication of discovery, and conserve the resources of the parties, their counsel and the judiciary.

Although most litigations centralized under Section 1407 are under the supervision of one transferee judge, there have been instances where the Panel has assigned another transferee judge to handle one or more actions in particular litigation. *See Washington Public Utilities Group v. United States District Court*, 843 F.2d 319 (9th Cir. 1987); *Hale v. Firestone Tire & Rubber Co.*, 756 F.2d 1322 (8th Cir. 1985); *In re Department of Energy Stripper Well Exemption Litigation*, 472 F.Supp. 1282 (J.P.M.L. 1979); *In re Sugar Industry Antitrust Litigation*, 395 F.Supp. 1271 (J.P.M.L. 1975), 427 F.Supp. 1018 (J.P.M.L. 1977), MDL-201/201A (J.P.M.L. May 5, 1978) (unpublished order) and 471 F.Supp. 1089 (J.P.M.L. 1979). In light of the presiding MDL-834 transferee judge's recusal in *Lexecon*, we transfer this action for coordinated or consolidated pretrial proceedings with the previously centralized MDL-834 actions to a second transferee judge in the District of Arizona. We note that i) a massive document depository is located in the District of Arizona and ii) the Ninth Circuit has before it an appeal of an order in MDL-834 which may be relevant to the *Lexecon* claims.

IT IS THEREFORE ORDERED that, pursuant to 28 U.S.C. § 1407, *Lexecon, Inc., et al. v. Milberg Weiss Bershad Specthrie & Lerach, et al.*, N.D. Illinois, C.A. No. 1:92-CV-7768, be, and the same hereby is, transferred to the District of Arizona and, with the consent of that court, assigned to the Honorable John M. Roll for inclusion in the coordinated or consolidated pretrial proceedings in this docket.

FOR THE PANEL:

/s/ John F. Nangle
JOHN F. NANGLE
Chairman

[Filed May 5, 1995]

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

(CIVIL ORDER—GENERAL)

MDL 834 PHX RMB
Civil Case No. CV93-1087 PHX JMR

LEXECON

v.

MILBERG WEISS

Date: May 2, 1995

HONORABLE JOHN M. ROLL

Pending before the Court are cross-motions relating to venue, Milberg Weiss' motion for sanctions, and plaintiffs' motion to strike amended interrogatory response.

As to venue, plaintiffs argue that the MDL statute, 28 U.S.C. § 1407, requires this Court to transfer this case to the MDL panel so that it may return to the Northern District of Illinois. Plaintiffs admit that no court has so construed that statute. Substantial authority exists to the contrary. Multidistrict Litigation Rule 14(b); *In re Fine Paper Antitrust Litig.*, 685 F.2d 810 (3d Cir. 1982); *In re Air Crash Disaster Near Chicago, Illinois*, 476 F. Supp. 445 (J.P.M.L. 1979). Under this authority, the Court concludes that it has the power to transfer this action to itself or any other court. 28 U.S.C. §§ 1404 and 1406.

Under § 1404(a)'s balancing test, the Court finds that the interest of justice is best served by transferring this action to itself. In light of the one claim which remains in this case for trial, judicial economy heavily weighs in favor of this Court continuing to exercise jurisdiction over this case.

On the remaining motions in this matter, the Court finds that plaintiffs' motion to strike is moot and concludes that defendant's motion is not properly before the Court because Local Rule 1.10(j) requires that counsel first confer in an effort to resolve the dispute prior to seeking the Court's intervention. Furthermore, as to the merits, the imposition of sanctions is unwarranted.

Therefore, IT IS HEREBY ORDERED that plaintiffs' motion to refer the case back to the Multidistrict Litigation Panel IS DENIED and Milberg Weiss' motion to transfer the case to this Court IS GRANTED.

IT IS FURTHER ORDERED that plaintiffs' motion to strike amended interrogatory response IS DENIED as moot.

IT IS FURTHER ORDERED that Milberg Weiss' motion for sanctions IS DENIED.

IT IS FURTHER ORDERED that a pretrial conference is hereby set in this matter for Tuesday, May 30, 1995 at 4:00 p.m. Counsel are directed to submit a joint proposed pretrial order by May 22, 1995, in accordance with the form attached.

/s/ John M. Roll
JOHN M. ROLL
United States District Judge

[Filed Jul. 21, 1995]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-70380
DC# CV-93-1087-PHX

LEXECON INC., *et al.*,
Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA,
Respondent,

and

MILBERG WEISS BERSHAD HYNES & LERACH, *et al.*,
Real Parties in Interest.

Petition for Writ of Mandamus
in the United States District Court
for the District of Arizona
John M. Roll, District Judge, Presiding

Argued and Submitted July 17, 1995
San Francisco, California

Before: FLETCHER, KOZINSKI and THOMPSON, Circuit Judges

MEMORANDUM *

In this petition for writ of mandamus, petitioners ask this court to: (1) vacate the district court's order which permanently transferred the above-entitled case to the District of Arizona pursuant to 28 U.S.C. § 1404(a); and (2) direct the district court to remand this case to the Northern District of Illinois pursuant to 28 U.S.C. § 1407. Petitioners also have filed a motion to stay the district court proceedings pending our decision. We deny the petition for writ of mandamus and deny the motion to stay as moot.

This court considers five factors in deciding whether a case is appropriate for mandamus relief: (1) whether the petitioner has no other adequate means, such as a direct appeal, to attain the relief desired; (2) whether the petitioner will be damaged or prejudiced in a way not correctable on appeal; (3) whether the district court's order is clearly erroneous as a matter of law; (4) whether the district court's order is an oft-repeated error; and (5) whether the district court's order raises new and important problems, or issues of first impression. *Bauman v. United States Dist. Court*, 557 F.2d 650, 653 (9th Cir. 1977). The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. *Wash. Pub. Util. Group v. U.S. Dist. Court*, 843 F.2d 319, 323 (9th Cir. 1987) ("WPPSS").

Here, as to the first factor, we are not satisfied that petitioners cannot attain the relief they request on direct appeal. The case is scheduled for trial on July 25, 1995. The trial, we understand, will be of short duration. The transfer order can be appealed immediately along with other issues in the event the petitioners lose on the merits.

As to the second factor, petitioners contend the expense and inconvenience of what may be an unnecessary

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trial in the District of Arizona meets the second *Bauman* factor. They rely on *Sunshine Beauty Supplies* for the proposition that "the prejudice that results from an erroneous transfer order is of a type not correctable on appeal." *Sunshine Beauty Supplies v. U.S. Dist. Court*, 872 F.2d 310, 311 (9th Cir. 1989).

Petitioners' reliance on *Sunshine Beauty Supplies* is misplaced. There, the district court's transfer order would have required the plaintiff, who sought confirmation of an arbitration award in the district court in California, to travel to Texas to present its claim. Here, the parties are already before the federal district court in Arizona and have been for more than a year as they pursued discovery. The district court's order transferring the present case to itself for trial simply leaves the parties where they are. It does not force them to go to another district to try their case. Petitioners have not shown how they would be prejudiced by conducting what is scheduled to be a four-day trial in the district where they have been litigating for more than a year. *Cf. Varsic v. U.S. Dist. Ct.*, 607 F.2d 245, 252 (9th Cir. 1979) (substantial prejudice shown by plaintiff who would have had to travel some 3,000 miles to prosecute his action).

As to the third factor, we cannot say the district court's order transferring this case to itself for trial is clearly erroneous as a matter of law. A question of law is clearly erroneous if we are left with the definite and firm conviction that a mistake has been made. *United States v. Harper*, 729 F.2d 1216, 1222 (9th Cir. 1984). Here, petitioners contend the district court clearly erred by: (1) ignoring 28 U.S.C. § 1407, which instructs that the case be remanded for trial to the Northern District of Illinois; and (2) transferring the case to itself under 28 U.S.C. § 1404(a).

We are not prepared to say that these contentions lack merit. However, despite what appears to be a clear statutory mandate, Multidistrict Litigation Rule 14(b)

explicitly authorizes a transferee court to transfer the action to itself for trial pursuant to 28 U.S.C. § 1404(a) and the district court's decision is supported by case law. *See In Re Fine Paper Antitrust Litigation*, 685 F.2d 810, 820 (3rd Cir. 1982); *Pfizer v. Lord*, 447 F.2d 122, 125 (2d Cir. 1971); *see also WPPS* at 326 (transferee court has authority to sua sponte change venue). Further, petitioners have cited no case law to the contrary. Although upon review on direct appeal, we might well reach the opposite result, it is not possible for us to hold at this juncture that the district court's decision is clearly erroneous. *See Harper*, 729 F.2d at 1222. In any direct appeal the merits panel is free to examine all of the issues.

Although there may be oft-repeated error in other circuits, petitioners do not demonstrate how the fourth *Bauman* factor applies in this circuit. While the fifth factor may be met, we conclude that in this case resolution is available on direct appeal in a setting more conducive to adequate briefing and full deliberation. We see no emergent need for instant resolution.

Accordingly, the petition for writ of mandamus is DENIED. The motion to stay is denied as moot.

Kozinski, Circuit Judge, dissenting.

I would grant the writ to correct an egregious, oft-repeated error in the interpretation of 28 U.S.C. §§ 1404, 1407. Section 1407(a) authorizes the Multidistrict Panel to transfer cases for *pretrial* proceedings; after those proceedings are completed, and before trial, "[e]ach action so transferred *shall* be remanded by the panel." (emphasis added). It's hard to imagine a clearer statutory command, or one more widely ignored.

Starting with the Second Circuit's summary treatment in *Pfizer, Inc.* v. *Lord*, 447 F.2d 122, 124-25 (2d Cir. 1971), the federal courts have simply disregarded the

statutory mandate *Pfizer* and a few subsequent cases have recognized they weren't following the statute, but justified their departure on grounds of policy or convenience. *See, e.g., Pfizer*, 447 F.2d at 124-25 (rejecting as absurd a result that would delay section 1404(a) motions until after remand); *In re Air Crash Disaster Near Hanover, New Hampshire*, 342 F. Supp. 907, 909 (D.N.H. 1971) ("I must recognize candidly that there is nothing in the language of 28 U.S.C. § 1407(a) or 1404(a) which directly allows, or even suggests, that the transferee judge has the power to transfer cases to his district, or any district, for purposes of trial."). Most have simply taken their place at the head of an ever-growing string cite. The Multidistrict Panel went so far as to enshrine this unlawful practice into one of its rules, J.P.M.L.R.P. 14(b), and the Federal Judicial Center's *Manual for Complex Litigation (Third)* § 21.61 (1995), mentions it as a standard option. Seldom have so many been so consistently wrong.

The time has come to put a stop to this illicit practice by saying loud and clear that the Multidistrict Panel assigns cases only for pretrial proceedings; it doesn't grant proprietary rights in them. Indeed, I consider it unseemly for district judges who have been entrusted cases for limited purposes to routinely glom onto them. It's true that section 1407(a) gives transferee courts power over pretrial proceedings and venue transfer motions under section 1404(a) fall under that general heading. But this presents no irreconcilable conflict between sections 1404 and 1407: Pretrial proceedings under 1407 are obviously limited to those raising issues common to other cases, primarily discovery; that's the entire point of the multidistrict process. Under section 1407, the Multidistrict Panel retains the power to transfer the case and that power is carefully limited to accomplish the statute's purpose. This precludes use of the general transfer section by district judges to subvert the panel's responsibility.

Section 1407 reflects an important policy choice: Cases may be transferred to remote locations, but only for the duration of pretrial procedures. When it comes to conducting a trial (and resolving other dispositive matters) plaintiffs retain their ancient right to select the forum. Had Congress meant to empower the Multidistrict Panel to reassign cases for resolution of dispositive matters, including trial, it would have drafted the statute much differently. This is a policy choice federal judges are bound to respect, regardless of their views of efficiency or their fondness for particular cases.

Petitioners here were dragged hundreds of miles from their home district in Illinois to appear before a judge in Arizona who had no familiarity with the case or expertise in the issues; they participated in no common proceedings; they benefitted from no coordinated discovery; and they are now forced to go to trial in the remote district because, having needlessly been required to spend so much time in Arizona, it makes no sense to send them back. There's a warped logic to each step in this process, but the net effect is to undercut the important policy of section 1407. That the matter comes up on appeal so seldom —and will likely be washed out by trial or settlement before it can come to us again in this case—makes it the more urgent for us to resolve the issue and put an end to an illicit practice that has developed willy-nilly during the last quarter century. If not we, who? If not now, when?

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 95-15759, 95-16403, 95-16595 and 95-16754

IN RE AMERICAN CONTINENTAL CORPORATION/LINCOLN SAVINGS & LOAN SECURITIES LITIGATION.

LEXECON INC.; DANIEL R. FISCHEL,
Plaintiffs-Appellees,

v.

MILBERG WEISS BERSHAD HYNES & LERACH, a partnership; PATRICK COUGHLIN; WILLIAM S. LERACH; KEVIN P. RODDY; LEONARD B. SIMON; MELVYN I. WEISS; PATRICIA HYNES; MICHAEL C. SPENCER; STEPHEN R. STEINBERG,
Defendants-Appellants.

IN RE AMERICAN CONTINENTAL CORPORATION/LINCOLN SAVINGS & LOAN SECURITIES LITIGATION.

LEXECON INC.; DANIEL R. FISCHEL,
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Defendants-Appellees.

IN RE AMERICAN CONTINENTAL CORPORATION/LINCOLN SAVINGS & LOAN SECURITIES LITIGATION.

LEXECON INC.; DANIEL R. FISCHEL,
Plaintiffs-Appellants,
Cross-Appellees,

v.

MILBERG WEISS BERSHAD HYNES & LERACH, a partnership; PATRICK COUGHLIN; WILLIAM S. LERACH; KEVIN P. RODDY; LEONARD B. SIMON; MELVYN I. WEISS; PATRICIA HYNES; MICHAEL C. SPENCER; STEPHEN R. STEINBERG,
Defendants-Appellees,
Cross-Appellants.

Appeals from the United States District Court
for the District of Arizona,
John M. Roll, District Judge, Presiding.
D.C. No. CV-93-01087-JMR

Argued and Submitted June 13, 1996
Decided Dec. 20, 1996

Before: SNEED, PREGERSON and KOZINSKI, Circuit Judges.

SNEED, Circuit Judge:

Of the many consequences of the failure of Lincoln Savings and Loan and its parent, American Continental

Corporation, the litigation that produced these consolidated appeals was just one. At the heart of these appeals is a suit by Lexecon Inc. against a number of the attorneys who represented the consolidated class of investors who lost money in the collapse of Lincoln Savings and its parent. Lexecon is a law and economics consulting firm that frequently serves as a defense expert in securities class actions prosecuted by the law firms that are defendants here. Lexecon had prepared several reports for Lincoln Savings and American Continental, and consequently became a target of the class' claims. In due course these claims were resolved. Thereafter Lexecon and its principal, Professor Daniel R. Fischel of the University of Chicago Law School, brought an action for, inter alia, malicious prosecution and defamation in federal district court for the Northern District of Illinois against several of the class attorneys—Milberg Weiss Bershad Hynes & Lerach and affiliated attorneys ("Milberg Weiss"), and Cotchett Illston & Pitre and affiliated attorneys ("Cotchett").[1] The underlying theory is that Milberg Weiss and Cotchett wrongfully dragged Lexecon into the Lincoln Savings litigation to satisfy a personal vendetta against Lexecon and Fischel. The Judicial Panel on Multidistrict Litigation ("JPML") transferred this case to the District of Arizona and assigned it to Judge John M. Roll.

The resolution of Lexecon's claims in Judge Roll's court generally was unfavorable, as were its rulings on Milberg Weiss' counterattacks. These have resulted in four appeals to this court which have been consolidated.

In No. 95-16595, Lexecon appeals the adverse judgment on its malicious prosecution and abuse of process claims and the denial of its motion for leave to amend, as well as the denial of its motion to remand the case to

[1] The firm of Greenfield & Chimicles was also a defendant initially, but is not involved in these appeals.

Illinois. In No. 95-16403, Lexecon appeals from the final judgment in favor of the Cotchett defendants.

Milberg Weiss appeals, in No. 95-15759, the district court's denial of its efforts to obtain injunctive relief against Lexecon's prosecution of its claims, and, in No. 95-16754, the dismissal of its counterclaims against Lexecon.

We have jurisdiction under 28 U.S.C. § 1291, and we affirm the judgments of the district court.

I.

SOURCES OF THIS LITIGATION

Following the collapse of Lincoln Savings, investors residing in many districts of the federal judicial system brought actions charging violations of federal securities laws and RICO. In due course, these cases were transferred to the District of Arizona, consolidated into MDL 834 (sometimes designated as "*Shields*" or "*Lincoln Savings*") and assigned to Judge Richard Bilby.

As early as 1990, the consolidated plaintiff class, now represented by (among others) Milberg Weiss and Cotchett, sought to add Lexecon and Fischel as defendants by filing a fifth amended complaint. Judge Bilby denied their motion to do so without prejudice. In February 1991, Judge Bilby granted the class' motion to file a sixth amended complaint, which added only Lexecon as a defendant, and alleged that:

> during 1987 and 1988 defendant Lexecon was engaged by ACC/Lincoln to perform services, including writing reports advocating the safeness of Lincoln's operations and the value of ACC/Lincoln's assets which were submitted to federal and state regulators in order to persuade them not to take regulatory action adverse to Lincoln.

Following a period of discovery, Lexecon's motion for summary judgment was denied. *See In re American Con-*

tinental Corp./Lincoln S & L Sec. Litig., 794 F.Supp. 1424, 1448-49 (D.Ariz.1992). Judge Bilby found there existed material issues as to whether Lexecon's reports were false and misleading, and whether Lexecon possessed reckless scienter as to Lincoln's fraudulent activities. In March 1992, the trial commenced. Almost four months later, and shortly before the close of evidence, Lexecon moved for a directed verdict. Judge Bilby denied the motion, again finding a jury question as to the level of Lexecon's knowledge of, and involvement in, Lincoln Savings' actions and practices.

On June 22, 1992, the class attorneys and Lexecon's counsel met in Judge Bilby's chambers to consider a means by which Lexecon's exposure to a jury verdict could be resolved without harmful consequences to its professional credibility and reputation. In furtherance of this end, Lexecon urged that any agreement that might be reached not be designated a "settlement." To accommodate Lexecon's concern, the term "resolution" was adopted. The terms of the resolution provided: First, that the court would enter an order dismissing Lexecon without prejudice; second, that the parties would sign a stipulation dismissing Lexecon with prejudice, which stipulation would be held by Judge Bilby to be entered on the court's record only if a new suit was initiated against Lexecon on the same claims; and, third, that Lexecon would provide class services as a subcontractor to Touche Ross who, as another defendant in MDL 834, had settled its liability for $7.5 million. The resolution also placed restrictions on class counsel's ability to cross-examine Lexecon experts in future lawsuits about Lexecon's involvement in MDL 834.

This unusual arrangement was implemented, although because of disagreements between Lexecon and class counsel, Lexecon discharged its obligations by turning over to the class the approximately $700,000 it had received in professional fees from Lincoln Savings and American Con-

tinental, rather than performing the class services. This discharge was accomplished in October 1992.

Those who then thought that the concerns of Lexecon had been relieved were wrong. On November 25, 1992, Lexecon filed in the Northern District of Illinois (Lexecon's home state) the action now before us on appeal. The complaint set forth claims for malicious prosecution, abuse of process, tortious interference, defamation, and common law and statutory commercial disparagement. In June 1993, the JPML transferred the case to the District of Arizona for consolidation with MDL 834, and assigned it to Judge Roll because Judge Bilby had recused himself.

Judge Bilby's recusal obviously resulted in part from his reaction on learning of Lexecon's suit in Illinois. He arranged a telephonic hearing held on December 7, 1992, and therein charged Lexecon with what he viewed as its incorrect portrayal of the resolution of its role as a defendant in MDL 834. Following this hearing and the submission of letter briefs by the parties, Judge Bilby placed an order in the record of MDL 834 in which he found portions of Lexecon's Illinois complaint to be "a false description of the conditions under which Lexecon was dismissed from this case." [2] The key portions of his

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[2] The text of this order reads as follows:

On August 12, 1992, Lexecon Inc. was dismissed from the above captioned matter. As this dismissal was without prejudice the Court retained jurisdiction and uses its powers now to clarify the terms and conditions of that dismissal. Moreover, pursuant to Fed.R.Civ.P. 60(a) the Court of its own initiative may correct any errors or omissions of the record. This Order in no way "rewrites" history, rather, it serves to clarify the terms and conditions of the Class Plaintiff and Lexecon's agreement. This act of Court is required due to certain allegations made by Lexecon in *Lexecon Inc. v. Milberg Weiss Bershad Spechrie & Learch* [sic], Case No. 92 C 7768 (N.D.Ill. Nov. 25, 1992), a suit filed against Class Plaintiffs' counsel in the Northern District of Illinois.

Specifically, in that Complaint Lexecon alleges:

> 63. In June 1992, after all the evidence was in, but before closing arguments, Defendants finally agreed to dismiss Lexe-

order disputed Lexecon's characterization of its payment to the Lincoln Savings class as "voluntary," and of the resolution as a termination of the litigation in Lexecon's favor:

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con, implicitly acknowledging the lack of merit in their complaint.

64. At the same time, because it believed that its professional services had been misused by Lincoln and [Charles H.] Keating [Jr.], Lexecon voluntarily undertook to benefit the class by providing claims administration services (computerizing mailing lists, processing claims and the like). When Defendants' complaints to the court made it impossible for Lexecon to provide these services, Lexecon decided to benefit the class instead by voluntarily returning the professional fees paid to it by Lincoln and Keating . . .

* * * *

92. The *Shields* case was terminated in Lexecon's and Fischel's favor.

Lexecon Inc. v. Milberg Weiss Bershad Spechrie & Learch [sic], Complaint, ¶ 63, ¶64 and ¶92.

The Court finds these paragraphs to be a false description of the conditions under which Lexecon was dismissed from this case. Although counsel for Lexecon at hearing argued that ¶ 93 [sic] is pled merely to satisfy one of the elements of malicious prosecution, it does not meet with reality and is factually incorrect.

The Class Plaintiffs/Lexecon resolution was a bargained-for exchange wherein consideration flowed both ways. Lexecon agreed to perform through Touche Ross certain administrative services to the Class Plaintiffs. Subsequently, Lexecon paid approximately $900,000 in cash instead of performing the services. (footnote omitted)

In return, Plaintiffs' counsel agreed to dismiss Lexecon from the case without prejudice and to not cross-examine the Lexecon experts about any "settlement" by Lexecon of the case. The fact that a case was filed and subsequently resolved without mention of the terms was always to be a proper subject of cross-examination. This aspect of the resolution was included because Lexecon and Mr. Fischel were concerned that if the term "settlement" was used, Lexecon experts would be open to in-depth cross-examination in courts across the country with consequent injury to its business. Hence, the term "settlement," and the connotations it might imply, was explicitly avoided and the term "resolution" used instead.

Counsel for Lexecon has furnished the Court with a portion of a transcript from the Eastern District of Tennessee, Northern District in a case captioned, *FDIC v. Ernst & Whitney*, CIV 3-87-364 (E.D.Tenn. Oct. 1, 1992) as evidence of Class Plaintiffs' Counsels' bad faith breach of the resolution. A copy of this transcript is attached as Exhibit "A".

It is the finding of this Court that Mr. Spencer cross-examined the Lexecon expert in accordance with the agreement reached with Lexecon in MDL 834 in every respect. Mr. Spencer never made any reference to the MDL 834 settlement before the jury in the Tennessee case, nor asked any questions in that case concerning a settlement in MDL 834. Indeed, Ms. Brickell on redirect, made the point that the FDIC had hired Lexecon *after* the Lincoln project. As long as Plaintiffs' counsels' future conduct is in accordance with Mr. Spencer's cross-examination in the Tenessee case, then the Lexecon resolution will not have been breached.

Moreover, under no circumstances was the Class Plaintiffs/Lexecon compromise a resolution in favor of *either* party or, more importantly, an adjudication on the merits. Instead, it was a bargained-for resolution of a disputed matter from which both parties benefited.

> The Class Plaintiffs/Lexecon resolution was a bargained-for exchange wherein consideration flowed both ways.
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> . . .
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> Moreover, under no circumstances was the Class Plaintiffs/Lexecon compromise a resolution in favor of either party or, more importantly, an adjudication on the merits. Instead, it was a bargained-for resolution of a disputed matter from which both parties benefited.

Lexecon's attempt to appeal this order to this court failed because there was as yet no final judgment in MDL 834. Lexecon took no appeal from the final judgment subsequently entered in March 1994.

Meanwhile, Judge Roll had begun his work on the case. In November 1993 he dismissed Lexecon's malicious prosecution and abuse of process claims. *In re American Continental Corp./Lincoln S & L Sec. Litig.*, 845 F.Supp. 1377, 1383-86 (D.Ariz.1993). All the defend-

ants in this case then answered, and Milberg Weiss filed counterclaims for breach of contract, fraud, unjust enrichment, and promissory estoppel. Discovery proceeded, followed by the defendants' motions for summary judgment.

In March 1994, before Judge Roll resolved the summary judgment motions, final judgment was entered in MDL 834. Lexecon thereupon moved under 28 U.S.C. § 1407 for a remand of its case to the Northern District of Illinois. Judge Roll instructed Lexecon to renew this motion after the close of discovery, which Lexecon did in November 1994. In response, Milberg Weiss moved to make the transfer to Arizona permanent under 28 U.S.C. §§ 1404(a) and 1406, and additionally moved for preliminary and permanent injunctions against the pursuit of this action, as well as all other claims made by Lexecon. Judge Roll denied the latter motion, and Milberg Weiss appealed. No. 95-15759.

Prior to ruling on the remand and transfer motions, Judge Roll granted summary judgment against Lexecon on its claims of tortious interference, commercial disparagement, and defamation based on the dissemination of Milberg Weiss' sixth amended complaint. *In re American Continental/Lincoln S & L Sec. Litig.*, 884 F.Supp. 1388 (D.Ariz.1995). Lexecon's defamation claim based on a sentence in a letter written by a Milberg Weiss partner, Kevin P. Roddy, to, and which appeared in, *The National Law Journal*, survived. Judge Roll also dismissed Milberg Weiss' counterclaims. *Id.* at 1397. Because the Cotchett defendants, who were never Lexecon's principal target in this litigation, had no part in the Roddy letter, Judge Roll entered a final judgment in their favor pursuant to Fed. R.Civ.P. 54(b). Lexecon timely appealed that judgment. No. 95-16403.

Thereafter, Judge Roll entered an order denying Lexecon's motion to return the case to the JPML for remand to the Northern District of Illinois, and granting the Milberg Weiss motion to make the transfer to the District of

Arizona permanent. Lexecon appealed the remand and transfer decision to this court by means of a petition for writ of mandamus, which was denied without prejudice as to Lexecon's raising the issue on direct appeal.

The climactic event in Judge Roll's court occurred on July 25-28, 1995, when Lexecon's defamation claim based on the Roddy letter to *The National Law Journal* was tried to a jury. The jury verdict favored Milberg Weiss. Lexecon appealed the subsequently entered final judgment, in particular the district court's transfer order and its dismissal of Lexecon's malicious prosecution and abuse of process claims. No. 95-16595. Milberg Weiss cross-appealed the dismissal of its counterclaims. No. 95-16754.

The order in which this court will address the issues before us on this appeal is as follows:

1. The permanent transfer of Lexecon's case from the Northern District of Illinois to the District of Arizona.
2. The denial of Milberg Weiss' motion for preliminary and permanent injunctions against the pursuit by Lexecon of its claims against Milberg Weiss and Cotchett.
3. The dismissal of Lexecon's malicious prosecution and abuse of process claims.
4. The dismissal of Milberg Weiss' counterclaims.

II.

THE PERMANENT TRANSFER TO THE DISTRICT OF ARIZONA

Nos. 95-16595 and 95-16403

The JPML transferred Lexecon's action to the District of Arizona pursuant to its authority under 28 U.S.C. § 1407(a), which states:

> When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section. . . . Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated[.]

The decision of the court below to transfer Lexecon's sole surviving claim to itself for trial, and its refusal to refer the case to the JPML for remand to Illinois, are vigorously challenged by Lexecon—and not for the first time.

Prior to the trial on the defamation claim, Lexecon brought before this court a petition for a writ of mandamus seeking: (1) to vacate the district court's order permanently transferring the remaining claim to the District of Arizona; and (2) to direct the district court to refer the case to the JPML for remand to the Northern District of Illinois. In an unpublished disposition, this court denied the petition and, while recognizing that Lexecon's arguments based on 28 U.S.C. §§ 1407 and 1404(a) might not lack merit, pointed out that they were contrary to existing case law and Multidistrict Litigation Rule 14(b). We explicitly recognized that the issue could be raised in an appeal on the merits. The dissent vigorously argued that 28 U.S.C. § 1407(a) authorizes the JPML to transfer a case for pretrial proceedings only, precluding a section 1404(a) transfer for a trial on the merits by the transferee court to itself, and that Multidistrict Litigation Rule 14(b) lacks a statutory basis. We now revisit these issues.

We review the district court's transfer under 28 U.S.C. § 1404(a) for an abuse of discretion. *Lou v. Belzberg*, 834 F.2d 730, 734 (9th Cir.1987), *cert. denied*, 485 U.S. 993, 108 S.Ct. 1302, 99 L.Ed.2d 512 (1988). We review de novo the district court's interpretation of its duties under 28 U.S.C. § 1407. *Monrad v. FDIC*, 62 F.3d 1169, 1171 (9th Cir.1995).

A. *Authority for the Section 1404(a) Transfer*

The power of a section 1407 transferee court to transfer a case to itself for trial has been recognized, explicitly or implicitly, by the courts that have considered the issue.[3] Patricia D. Howard, the Clerk of the JPML, has stated:

> Although the Panel's power for the most part is limited to transfer for pretrial only, it is not uncommon for a transferee judge assigned by the Panel to transfer to his own or another district under 28 U.S.C. §§ 1404(a) or 1406 the actions which were previously assigned to him or her by the Panel under Section 1407.[4]

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[3] *See, e.g., In re Food Lion, Inc., Fair Labor Standards Act Litig.*, 73 F.3d 528, 532 n. 7 (4th Cir.1996); *Washington Pub. Util. Group v. United States Dist. Ct.*, 843 F.2d 319, 326 (9th Cir.1987); *In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1178 (D.C.Cir.1987), *aff'd*, 490 U.S. 122, 109 S.Ct. 1676, 104 L.Ed.2d 113 (1989); *Kohr v. Allegheny Airlines*, 504 F.2d 400, 402 (7th Cir.1974), *cert. denied*, 421 U.S. 978, 95 S.Ct. 1980, 44 L.Ed.2d 470 (1975); *Pfizer, Inc. v. Lord*, 447 F.2d 122, 124-25 (2d Cir.1971); *Matter of Mahurkar Double Lumen Hemodialysis Catheter Patent Litig.*, 750 F.Supp. 330, 332 (N.D.Ill.1990); *In re Air Crash Disaster*, 476 F.Supp. 445, 450 (J.P.M.L.1979); *In re CBS Color Tube*, 342 F.Supp. 1403, 1404-05 (J.P.M.L.1972).

[4] Patricia D. Howard, "A Guide to Multidistrict Litigation," 124 F.R.D. 479, 479 (1989); *see also* Stanley A. Weigel, "The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts," 78 F.R.D. 575, 581 n. 42 (1977); Moore's Federal Practice, *Manual for Complex Litigation* ¶ 31.13 at 251 n.785 (3d ed. 1995) ("Although transfer by the panel under § 1407 is only for pretrial purposes, the transferee court may find it appropriate to transfer cases to itself for trial under 28 U.S.C. § 1404 or § 1406.").

Permitting the transferee court to transfer a case to itself upon completion of its pretrial work often promotes efficiency in the disposition of the case or cases.[5] The time required for a new judge to become acquainted with the litigation is eliminated, as is the possibility of conflicting or duplicative rulings and proceedings. The above reasons strongly favored trial by the transferee court in this case, where pretrial proceedings left only one claim to be resolved by a trial that was scheduled to begin immediately and conclude in four days.

Moreover, the transferee court is empowered to dispose of the cases transferred to it by means of summary judgment or dismissal.[6] Therefore, logic supports its ability to dispose of the case, at least under the circumstances present here, by trial.

Despite longstanding practice and the efficiency arguments, Lexecon argues that 28 U.S.C. § 1407(a) requires remand for trial. The provision states in relevant part:

> Each action so transferred *shall be remanded by the panel* at or before the conclusion of such pretrial proceedings to the district from which it was transferred *unless it shall have been previously terminated* (emphasis added).

Equally specific is JPML R. 14(b), promulgated under the authority granted the JPML by 28 U.S.C. § 1407(f):

[5] Judge Kozinski, in his dissent, decries the fact that in multidistrict litigation cases concerns for judicial economy trump the usual deference to a plaintiff's choice of forum. We fail to see the problem here. Judicial economy is extremely important in multidistrict litigation: sufficiently important that Congress enacted a special statute, 28 U.S.C. § 1407, to ensure that in multidistrict cases the interest in judicial economy would not be overidden by deference to a plaintiff's choice of forum.

[6] *See, e.g., In re Food Lion, Inc.*, 73 F.3d at 532; *In re Korean Air Lines*, 829 F.2d at 1178; Weigel, "The Judicial Panel on Multidistrict Litigation," 78 F.R.D. at 582-83.

> Each transferred action that has not been terminated in the transferee district court shall be remanded by the Panel to the transferor district for trial, unless ordered transferred by the transferee judge to the transferee or other district under 28 U.S.C. § 1404(a) or 28 U.S.C. § 1406.

This conflict between statute and rule, while apparent, is not real.[7] Congress in enacting section 1407 in 1968 was concerned with the emerging phenomenon of complex, multidistrict litigation. Its focus was upon creating and defining the functions of the JPML, not on redefining or circumscribing the traditional powers of the district court to which a case has been transferred. This is made reasonably clear by the House Report accompanying the

[7] The dissent contends that Judge Roll contravened the text of 28 U.S.C. §§ 1404(a) and 1407(a) by denying Lexecon's motion to return the case to the JPML and granting Milberg Weiss' motion to transfer the case permanently to the District of Arizona. In making this argument, the dissent conveniently ignores the text of JPML Rule 14(b), which clearly interprets section 1404(a) to authorize the transferee judge to transfer the case to the transferee district. The dissent also conveniently ignores the text of 28 U.S.C. § 1407(f), which explicitly grants the JPML broad authority to "prescribe rules," such as Rule 14(b), as long as those rules are "not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure." 28 U.S.C. § 1407(f).

Implicit in the dissent's argument, then, is a claim that Rule 14(b) is inconsistent with sections 1404(a) and 1407(a). The dissent is far too quick to accuse the JPML of violating the statute that created it. It is useful to recall that the JPML consists of "seven circuit and district judges designated from time to time by the Chief Justice of the United States." 28 U.S.C. § 1407(d). Respect for our brethren, and their longstanding practice, requires us to presume, absent compelling evidence to the contrary, that the rules promulgated pursuant to section 1407(f) are "not inconsistent with Acts of Congress." The alleged inconsistencies cited by the dissent are not sufficiently glaring to overcome that presumption. Hence, we conclude that Rule 14(b) is a valid exercise of the JPML's rulemaking authority, and that Judge Roll's actions in this case were fully justified.

proposed statute; that report stated that the bill "affects only the pretrial stages in multidistrict litigation. It would not affect the place of trial in any case or exclude the possibility of transfer under other Federal statutes." H.Rep. No. 1130, 90th Cong., 2d Sess. 3, *reprinted in* 1968 U.S.C.C.A.N. 1898, 1900. The report continued, *id.* at 1901-02:

> The subsection requires that transferred cases be remanded to the originating district at the close of coordinated pretrial proceedings. The bill does not, therefore, include the trial of cases in the consolidated proceedings. The experience of the Coordinating Committee [for Multiple Litigation of the U.S. District Courts, established by the Judicial Conference of the United States] was limited to pretrial matters, and the committee consequently considers it desirable to keep this legislative proposal within the confines of that experience. . . . Of course, 28 U.S.C. 1404, providing for changes of venue generally, is available in those instances where transfer of a case for all purposes is desirable.

Thus, Congress, because of the nation's limited experience with multidistrict litigation, sought to design only the powers and duties of its new creation, the JPML. Despite some uncertainty about this matter initially, the power of the transferee court to transfer a case to itself for trial has been reinforced by its consistent recognition in practice. Recourse to such sustained practice, particularly when approved by the JPML, is a legitimate aid to statutory interpretation. *See United States v. American Trucking Ass'n*, 310 U.S. 534, 549, 60 S.Ct. 1059, 1067, 84 L.Ed. 1345 (1940). In the case before us, this reading also strongly promotes judicial efficiency, which was a primary purpose of the legislation that created the JPML. *See* H.Rep. at 2, 1968 U.S.C.C.A.N. at 1899.

B. *The Procedures Available to Initiate Remand*

Additional insight into the apparently mandatory language of 28 U.S.C. § 1407(a) is provided by JPML Rule 14(c). That rule imposes the duty on the JPML to:

> consider remand of each transferred action . . . at or before the conclusion of coordinated or consolidated pretrial proceedings on (i) motion of any party, (ii) suggestion of the transferee district court, or (iii) the Panel's own initiative[.]

The absence of any such "motion" by a party, "suggestion" by the transferee court, or "initiative" of the Panel appears to leave the case in the care of the transferee court. Under these circumstances the transferee court must complete the litigation, even if it involves a trial, to avoid the absurdity of indefinitely suspended litigation, the pretrial proceedings of which have come to a close. Therefore, where the transferee court has declined to suggest a remand, the JPML has not ordered a remand on its own initiative, and the litigant has failed to seek a remand before the JPML, the transferee court is entitled to terminate the proceedings by conducting the trial. Besides setting out a procedure by which the JPML's duty to remand is triggered, this rule thus gives effect to the final clause of section 1407(a) by rendering its mandatory clause inoperative where the action has been terminated, even by trial.

That is the precise position in which the case rests in this appeal. The JPML's duty to remand was not activated. To repeat, the trigger to such activation was never pulled. Neither the district court nor the JPML sought to remand the case. Moreover, Lexecon, in lieu of moving the JPML for a remand, brought its motion before the district court, and now appeals to us for a remedy. Neither this procedure, nor its earlier petition for a writ of mandamus, amounts to a motion for remand brought before the JPML. Lexecon failed to seek succor from the

one source that easily could have granted it if it so chose.[8] The district court, therefore, properly proceeded to conduct a trial on the single remaining defamation claim, following the completion of the pretrial proceedings.

C. *Propriety of the Section 1404(a) Transfer*

Besides arguing that the district court's transfer to itself was without authority by virtue of section 1407, Lexecon also argues that it was improper under section 1404(a). Lexecon argues that any incremental gain in efficiency was at its expense, and that it was prejudiced by being dragged from Chicago, Illinois, to Arizona and forced to appear before Judge Roll, who was unfamiliar with MDL 834 and who improperly proceeded to "dismantle" its case. We disagree.

Lexecon, to put it gently, was no stranger to the District of Arizona; its participation in MDL 834 precludes any such claim. Moreover, Judge Roll had become quite familiar with the case by the time of his decision to transfer the trial of the defamation claim to his own district. Finally, Judge Roll's dismissal of most of Lexecon's claims is not a ground for showing prejudice.

After a careful examination of the record and consideration of the arguments, we find no reason to question the district court's authority to try Lexecon's defamation claim in the District of Arizona, or the fairness of doing so.

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[8] The dissent argues that Lexecon should not be faulted for its failure to move the JPML for remand, because Lexecon knew that the JPML would probably have denied the motion. Even assuming that Lexecon's prospects for success were slim, the fact remains that Rule 14(c) gave Lexecon the option to present its case to the JPML, including the arguments advanced by Judge Kozinski in his dissent. Lexecon chose not to pursue that option. In making this choice, Lexecon also knew, or should have known, that the option would expire, pursuant to Rule 14(b), if and when Judge Roll decided to transfer the case permanently to the District of Arizona.

III.

THE DENIAL OF INJUNCTIVE RELIEF SOUGHT BY MILBERG WEISS

No. 95-15759

After final judgment was entered in MDL 834 and Lexecon renewed its motion for a suggestion of remand, Milberg Weiss sought injunctive relief on the ground that the final judgment was res judicata as to Lexecon's claims. Milberg Weiss requested:

> (1) an order preliminarily enjoining plaintiffs . . . from prosecuting or otherwise pursuing against the Milberg Defendants, in any other judicial district or forum, any claims or other matters that were raised or could have been raised in the *Lincoln Savings* action . . .; and (2) an order permanently enjoining plaintiffs from prosecuting or otherwise pursuing those claims or other matters in any court or forum.

The district court concluded that Lexecon's claims were not precluded, and denied the motion.

We must uphold the denial of injunctive relief "unless the court incorrectly applied the law, relied on clearly erroneous factual findings, or otherwise abused its discretion." *Contract Serv. Network, Inc. v. Aubry*, 62 F.3d 294, 297 (9th Cir.1995). We review de novo issues of law underlying the denial, including the determination that Lexecon's claims were not barred by res judicata. *Id.* We now affirm.

A. *Mootness*

Initially, we confront the issue raised by Lexecon of the mootness of this appeal.[9] An appeal is moot "when

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[9] Lexecon also argues that the denial was not an appealable interlocutory order under 28 U.S.C. § 1292(a)(1). This is irrelevant given that final judgment has since been entered. *See In re Jenson,*

events occur which prevent the appellate court from granting any effective relief even if the dispute is decided in favor of the appellant." *Holloway v. United States*, 789 F.2d 1372, 1373 (9th Cir.1986) (internal quotation omitted). To the extent that Milberg Weiss sought to have the district court enjoin the litigation before the district court, which thereafter was completed favorably to Milberg Weiss by the entry of final judgment, its appeal from the court's failure to do so is moot. However, mootness does not extend to the efforts of Milberg Weiss to enjoin Lexecon from prosecuting its claims in other courts.

B. *Res Judicata*

Milberg Weiss supports its effort to enjoin Lexecon by arguing that the MDL 834 litigation foreclosed Lexecon's claims by reason of res judicata. This considerably overstates the preclusive effect of Judge Bilby's actions.

Under the doctrine of res judicata, "[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398, 101 S.Ct. 2424, 2427-28, 69 L.Ed.2d 103 (1981). Judge Bilby's action pertaining to Lexecon was to dismiss the claims of the class against Lexecon without prejudice, in accordance with the parties' resolution. We have held that a dismissal without prejudice lacks res judicata effect. *In re Corey*, 892 F.2d 829, 835 (9th Cir.1989), *cert. denied*, 498 U.S. 815, 111 S.Ct. 56, 112 L.Ed.2d 31 (1990). Nor was Judge Bilby's subsequent order of December 31, 1992 (*see supra* n. 2), a judgment on the merits of the claims against Lexecon. That order merely clarified the terms of the resolution, indeed emphasized that there had been no judgment on the merits of the claims against Lexecon.

980 F.2d 1254, 1258 (9th Cir.1992) (upon entry of final judgment, interlocutory orders become appealable). We decline to discuss Lexecon's several additional arguments concerning procedural irregularities in Milberg Weiss' appeal, which are without merit.

Lexecon's reliance on *Western Sys., Inc. v. Ulloa*, 958 F.2d 864 (9th Cir.1992), *cert. denied*, 506 U.S. 1050, 113 S.Ct. 970, 122 L.Ed.2d 125 (1993), and *Golden v. Pacific Maritime Ass'n*, 786 F.2d 1425 (9th Cir.1986), is therefore misplaced. Those cases develop the relitigation exception to the Anti-Injunction Act, which allows a district court to enjoin litigation in other courts if such litigation is barred by res judicata.[10] Because Lexecon's claims are not barred by res judicata, those cases are not controlling.

C. *The Requirements for Injunctive Relief*

Even if Lexecon's claims were barred by res judicata, Milberg Weiss has still failed to show that the district court abused its discretion in declining to grant injunctive relief. To obtain a preliminary injunction, a party must show either "(1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) the existence of serious questions going to the merits and the balance of hardships tipping in the movant's favor." *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 516 (9th Cir.1993) (internal quotation omitted), *cert. dismissed*, 510 U.S. 1033, 114 S.Ct. 671, 126 L.Ed.2d 640 (1994). At the time the Milberg Weiss motion was filed, no such showing could be made. At that time, February 6, 1995, Milberg Weiss had also moved for a permanent transfer of this case to the Arizona District, and Judge Roll was poised to rule on Lexecon's motion to refer the case to the JPML for remand. His rulings thereafter were generally favorable to Milberg Weiss. Even had these rulings been adverse to Milberg Weiss, it could have appealed them to this court; therefore, it could not show either the possibility of irreparable injury or that the balance of

[10] *See* 28 U.S.C. § 2283 ("A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."); *Western Sys.*, 958 F.2d at 871; *Golden*, 786 F.2d at 1427.

hardships tipped in its favor. *See United States v. Rohm & Haas Co.*, 721 F.Supp. 666, 699 (D.N.J.1989) (refusing to enjoin itself from entering proposed consent decree where appealability of the decree defeated any claim of irreparable harm). Nor was there any indication that Lexecon was likely to initiate an entirely new lawsuit on the same claims in a different forum. In short, Milberg Weiss failed to establish the conditions prerequisite to the issuance of the preliminary and permanent injunctions it sought.[11]

IV.

THE DISMISSAL OF THE MALICIOUS PROSECUTION AND ABUSE OF PROCESS CLAIMS

Nos. 95-16595 and 95-16403

We now turn to Lexecon's appeal from the dismissal by the district court under Fed.R.Civ.P. 12(b)(6) of its malicious prosecution and abuse of process claims. Our review of this dismissal is de novo, with all factual allegations taken as true and construed in the light most favorable to Lexecon. *See Gotcher v. Wood*, 66 F.3d 1097, 1099 (9th Cir.1995), *petition for cert. filed*, 64 U.S.L.W. 3605 (1996). The district court's denial of Lexecon's motion for leave to amend its complaint is reviewed for an abuse of discretion. *United States v. County of San Diego*, 53 F.3d 965, 969 n. 6 (9th Cir.1995), *cert. denied*, —— U.S. ——, 116 S.Ct. 183, 133 L.Ed.2d 121 (1995).

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[11] Lexecon requests attorneys' fees for a frivolous appeal under Fed.R.App.P. 38. However, Rule 38, as amended effective December 1, 1994, requires that any such request be made by a separately filed motion. Without commenting on the merits of its request, we therefore deny Lexecon's request without prejudice to its filing a separate motion for attorneys' fees.

A. *Malicious Prosecution*

Under Arizona law, which the parties no longer dispute is the applicable law, the plaintiff must allege, and to prevail must ultimately prove, that the defendant "(1) instituted a civil action which was (2) motivated by malice, (3) begun without probable cause, (4) terminated in plaintiff's favor and (5) damaged plaintiff." *Bradshaw v. State Farm Mut. Auto Ins. Co.*, 157 Ariz. 411, 758 P.2d 1313, 1319 (1988). Under Arizona law, probable cause requires that the plaintiff honestly believe in the lawsuit's possible merits and that the belief be objectively reasonable. *Id.* (citing Restatement (2d) of Torts § 675 comment c; Prosser & Keeton on the Law of Torts § 120, at 893 (5th ed. 1984)).

There is no dispute here that Lexecon has properly alleged the first and last elements of the cause of action. Assuming, for purposes of argument only, that Lexecon has sufficiently alleged lack of probable cause and malice as well, its claim fails nonetheless. Judge Bilby's rulings in MDL 834, including his order of December 31, 1992 (*see supra* n. 2), plainly indicate that the litigation was not "terminated" in Lexecon's favor.

Lexecon attempts to avoid this roadblock to its malicious prosecution claim by insisting that the district court erred in examining the MDL 834 record in ruling on Milberg Weiss' 12(b)(6) motion.[12] In general, material outside the pleadings cannot be considered in ruling on a motion to dismiss, unless the motion is treated as one for summary judgment and the parties are "given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Fed.R.Civ.P. 12(b); *Jacobson v. AEG Capital Corp.*, 50 F.3d 1493, 1496

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[12] *See, e.g., In re American Continental*, 845 F.Supp. at 1385. ("The record before this Court as recited in the *Shields* rulings is highly persuasive evidence that the case against Lexecon meets the probable cause threshold.").

(9th Cir.1995). Nonetheless, ample authority exists which recognizes that matters of public record, including court records in related or underlying cases which have a direct relation to the matters at issue, may be looked to when ruling on a 12(b)(6) motion to dismiss. *See Shaw v. Hahn*, 56 F.3d 1128, 1129 n. 1 (9th Cir.1995), *cert. denied*, —— U.S. ——, 116 S.Ct. 418, 133 L.Ed.2d 336 (1995); *Henson v. CSC Credit Serv.*, 29 F.3d 280, 284 (7th Cir.1994); *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir.1992).

It would be absurdly formal to hold that Judge Bilby's published opinion in MDL 834 and his December 31, 1992, order must be ignored in ruling on a motion to dismiss Lexecon's malicious prosecution claim. Only by alleging its own involvement as a defendant in MDL 834 was Lexecon able to frame its claim of malicious prosecution; why should the district court be limited by Lexecon's selective telling of a story that unfolded, and was duly recorded, in its sister court? Milberg Weiss, in its motion to dismiss, was entitled to refer to the record and outcome of the MDL litigation, and the district court was entitled to do the same in assessing the viability of Lexecon's claim. Formalism has its place, but that place is not here.

Lexecon argues further that the record in MDL 834 supports its contention that the litigation terminated in its favor. This is not true. "A termination does not satisfy the [favorable termination] element [of a malicious prosecution claim] if it is the result of compromise or settlement of the claim." *Frey v. Stoneman*, 150 Ariz. 106, 722 P.2d 274, 277 (1986) (en banc). "If entry of summary judgment was merely the formal means of securing the parties' settlement benefits, the judgment cannot form the basis for a malicious prosecution action." *Id.* 722 P.2d at 278-79 (internal quotation omitted). Here, the avoidance of the use of the term "settlement" in favor of the alternative "resolution" does not alter that result.

Lexecon urges us to rely on *Bradshaw*, 758 P.2d at 1321, which held that a settlement may be a favorable termination depending on the surrounding facts. Lexecon argues that favorable termination is a question of fact that cannot be resolved on a 12(b)(6) motion. We disagree. In *Bradshaw*, the settlement terms called for the plaintiff to withdraw its action, pay the defendants $60,000, and stipulate to a dismissal with prejudice. Here, it was the defendant Lexecon that paid $700,000 in exchange for its dismissal from MDL 834. No additional factual development is necessary. The circumstances of this case do not indicate that the MDL 834 litigation against Lexecon terminated in its favor. It follows that Lexecon's malicious prosecution claim against both Milberg Weiss and Cotchett fails.

It also follows that we need not consider the argument of Milberg Weiss that the tort of malicious prosecution has been reshaped by First Amendment principles developed in the *Noerr-Pennington* doctrine [13] and *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 54-56, 113 S.Ct. 1920, 1925, 123 L.Ed.2d 611 (1993) ("*PREI*"). Milberg Weiss argues that these decisions have raised the threshold for access to a malicious prosecution claim by requiring the plaintiff to show that the defendant's earlier suit was "objectively baseless" and one in which "no reasonable litigant could realistically expect success on the merits." [14] This formu-

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[13] *See California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961).

[14] The district court did dismiss the malicious prosecution claim on this ground, concluding that Lexecon could not show that the class' claims against it in MDL 834 were objectively baseless as required by *PREI*. However, we may affirm the dismissal on any basis supported by the record. *Pentax Corp. v. Myhra*, 72 F.3d 708, 710 (9th Cir.1995).

lation, if applied, would alter the meaning under Arizona law of the "probable cause" element, and to some degree the "malice" element, by eliminating the subjective, honest belief requirement.

Noerr-Pennington and *PREI* were federal antitrust cases that did not address the state law tort of malicious prosecution. In this circuit, the application of this line of cases to state law claims has been unpredictable. For example, the *PREI* objective baselessness standard was not applied to a National Labor Relations Board decision that a libel suit brought by an employer against a union was an unfair labor practice. *PREI* was said not to be on point. *Diamond Walnut Growers, Inc. v. NLRB*, 53 F.3d 1085, 1087-88 (9th Cir.1995). On the other hand, a timber company counterclaim against an environmental organization for abuse of process, based on that organization's efforts to enjoin logging on the timber company's land, was required to meet the heightened pleading standard associated with *Noerr-Pennington*. *Oregon Natural Resources Council v. Mohla*, 944 F.2d 531, 533-35 (9th Cir.1991).

The rationalizing principle of these cases is unclear, unless it rests on a judicial preference for certain types of litigation that appear to promote specifically recognized public interests. To encourage vigilant pursuit of these interests, it may be thought proper to protect them against threats of malicious prosecution by raising the barrier to access to that remedial tort action. Milberg Weiss argues, in substance if not in form, that the class action on behalf of Lincoln Savings investors easily conforms to that rationalization. Innocent investors in improperly operated savings and loan institutions and their legal representatives are as deserving of protection from the threat of malicious prosecution by those who have rendered financial services to such institutions as are plaintiffs in antitrust or environmental proceedings.

While there is a certain appeal in such an approach, we decline to rest our rejection of Lexecon's malicious prosecution on this ground.[15] We hold only that the MDL 834 litigation against Lexecon was not terminated in its favor. Therefore, under Arizona law, Lexecon has failed to state a claim of malicious prosecution.

B. *Abuse of Process*

Abuse of process is described by the Restatement (Second) of Torts § 682 (1977) as follows:

> One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process.

This definition is accepted by the Arizona courts. *See Nienstedt v. Wetzel*, 133 Ariz. 348, 651 P.2d 876, 881

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[15] There is now extensive case law on both sides of the question whether the *Noerr-Pennington* doctrine brings first amendment principles to bear on state law tort claims. *See, e.g., State of South Dakota v. Kansas City Southern Indus.*, 880 F.2d 40, 50-51 (8th Cir.1989) (applying first amendment analysis to a state claim for tortious interference with contractual relations), *cert. denied*, 493 U.S. 1023, 110 S.Ct. 726, 107 L.Ed.2d 745 (1990); *Brownsville Golden Age Nursing Home, Inc. v. Wells*, 839 F.2d 155, 159-60 (3d Cir.1988) (applying defamation and *Noerr-Pennington* analyses to tort claim based on defendants' actions in alerting authorities to plaintiff's violations of law); *Havoco of Am., Ltd. v. Hollobow*, 702 F.2d 643, 649 (7th Cir.1983) (applying *Noerr-Pennington* and its sham litigation exception "to protect the First Amendment right to petition against claims of tortious interference with business relationships"); *Sierra Club v. Butz*, 349 F.Supp. 934, 938-39 (N.D. Cal.1972) (applying first amendment analyses of *Noerr-Pennington* and defamation cases to state counterclaim for interference with advantageous relationship); *Florida Fern Growers, Inc. v. Concerned Citizens of Putnam County*, 616 So.2d 562, 569 (Fla.1993) (declining to follow *Sierra Club v. Butz*). The time may come when this circuit must speak definitively on the question. However, this is not the right time, or the right case, in which to do so.

(App.1982); *Morn v. City of Phoenix*, 152 Ariz. 164, 730 P.2d 873, 875 (App.1986). Plaintiff must show that defendants (1) committed a willful act in the use of judicial process (2) for an improper ulterior purpose. *Nienstedt*, 651 P.2d at 881.

The gravamen of the tort is not "the wrongful procurement of legal process or the wrongful initiation of criminal or civil proceedings; it is the misuse of process, no matter how properly obtained, for any purpose other than that which it was designed to accomplish." Restatement § 682, comment a; *see also Morn*, 730 P.2d at 875.

Accordingly, the task of this court is to determine whether the addition of Lexecon as a defendant in the MDL 834 litigation had as its primary purpose an objective for which that litigation was not intended. We hold that no such objective existed in MDL 834.

It is clear that the primary purpose of the MDL 834 litigation was to recover from the collapse of American Continental/Lincoln Savings on behalf of the investors therein such assets as was possible under the law. Lexecon, of course, does not deny that. Rather, its focus is upon its inclusion as a defendant. It asserts that class counsel's primary purpose is attempting to add Lexecon and Fischel as defendants was "(1) to extract false testimony implicating other *Shields* defendants, (2) to prevent Arthur Young & Co. from using Lexecon as an expert in *Shields*, and (3) 'to make Lexecon . . . far less attractive to potential clients as expert witnesses.'" *In re American Continental*, 845 F.Supp. at 1382.

Lexecon alleges that after Milberg Weiss sought to file a fifth amended complaint adding both Lexecon and Fischel as defendants, it offered to dismiss the motion in exchange for "false testimony" against existing defendants. Lexecon refused, and leave to file this fifth amended complaint was subsequently denied. The alleged attempt to extract false testimony therefore never amounted to anything. Although process did later issue against Lexecon only as a result of defendants' successful motion to file their sixth amended complaint, the attempt to coerce false testimony was not repeated. Therefore, Lexecon cannot show that the primary purpose behind Milberg Weiss' use of process was to coerce false testimony.

Lexecon also points to additional acts of Milberg Weiss that it claims amounted to an abuse of process. Some of these acts, such as the unsuccessful motion to file the fifth amended complaint, occurred "pre-process," and were therefore not actionable.[16] Others were collateral to the MDL 834 litigation, such as Milberg Weiss attorneys' use of that litigation to impeach Lexecon expert witnesses during cross-examination in separate and distinct litigation. Such cross-examination, so long as it conformed to the terms of the MDL 834 resolution, was not improper and therefore cannot form the basis of an abuse of process claim.

The acts alleged by Lexecon did not have as their *primary purpose* to inflict harm on Lexecon or Fischel. Nor did the addition of Lexecon as an MDL 834 defendant to assert that Lexecon bore some responsibility for those investors' losses constitute an abuse of process. Lexecon's abuse of process claim was therefore properly dismissed.[17]

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[16] Although Arizona courts define "process" broadly, *Nienstedt*, 651 P.2d at 880, we agree with the district court that it is not read so broadly as to include a failed attempt to sue in which process never issued.

[17] Examination of Lexecon's proposed second amended complaint shows that it merely reiterates the same claims in new language. Because leave to amend is inappropriate where the amendment does not solve the legal deficiencies in the complaint, the district court did not abuse its discretion in denying Lexecon's motion for leave to amend. *See Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990).

V.

THE DISMISSAL OF MILBERG WEISS' COUNTERCLAIMS

No. 95-16754

The Milberg Weiss counterclaims alleged fraud, breach of contract, unjust enrichment, and promissory estoppel. The alleged source of these claims is the negotiations that led to the resolution of Lexecon's exposure to liability in MDL 834. We review their dismissal de novo. *Gotcher*, 66 F.3d at 1099; *Barrus v. Sylvania*, 55 F.3d 468, 469 (9th Cir.1995).

First, Milberg Weiss alleged that while Lexecon said it was negotiating the "resolution" to avoid damaging cross-examination about MDL 834 in future cases, its true reason was to preserve its ability to sue class counsel for malicious prosecution by avoiding an unfavorable jury verdict. The district court properly dismissed this claim. While Milberg Weiss is a party in the litigation now before this court, it was not a party in the MDL 834 litigation; rather, it was a counsel to the class on whose behalf the proceedings against Lexecon were brought. As the district court put it: "Whatever harm resulting from the resolution was sustained by the class, not by class counsel." *In re American Continental*, 884 F.Supp. at 1397.

Second, Milberg Weiss argues that during the negotiations, Lexecon represented that it had no applicable insurance when in fact it did have such insurance, and that it relied on that representation in agreeing to the resolution. The district court properly ignored this claim because Milberg Weiss failed either to raise the issue in its pleadings, or to request leave to amend. *See* Fed.R.Civ.P. 15(a).

VI.

CONCLUSION

The judgments in Nos. 95-15759, 95-16403, 95-16595, and 95-16754 are affirmed.

KOZINSKI, Circuit Judge, dissenting.

Since the Judicial Panel on Multidistrict Litigation (JPML) was created in 1968, it has transferred 92,562 cases for consolidated pretrial proceedings. Only 3,508 of these—less than four percent—have been sent back for trial in the district where the complaint was filed. Administrative Office of the United States Courts, *Judicial Business of the United States Courts: 1995 Report of the Director* 32. Yet the statute which authorizes the JPML to transfer cases for coordinated or consolidated pretrial proceedings commands that "[e]ach action so transferred shall be remanded by the [JPML] at or before the conclusion of such pretrial proceedings to the district from which it was transferred. . . ." 28 U.S.C. § 1407(a). These numbers tell the story of a remarkable power grab by federal judges who have parlayed a narrow grant of authority to conduct consolidated discovery into a mechanism for systematically denying plaintiffs the right to trial in their forum of choice.

You don't have to stare very long at the statutory language and drafting history to realize this is not at all what Congress had in mind when it passed 28 U.S.C. § 1407. The language itself is clear as sunlight: A case may be transferred in order to take advantage of consolidated or coordinated discovery with other cases having a common factual nucleus. Coordinated or consolidated pretrial proceedings are to be handled by the transferee court but, if the case is to be tried, it must go back from whence it came.

The legislative history—if such limpid prose needs elucidation—is perfectly consistent with the text. Congress made a deliberate choice to authorize transfer for pretrial purposes only: "[T]he bill provides for the transfer of venue of an action for the limited purpose of conducting coordinated pretrial proceedings." H.Rep. No. 1130, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. 1898, 1900. Congress thought about authorizing the JPML to

transfer cases for all purposes but decided not to: "The bill does not, therefore, include the trial of cases in the consolidated proceedings." *Id.* at 1901. Congress promised to return to the issue if it found the current grant of authority insufficient: "If . . . further experience justifies extending [section 1407] to include consolidation and coordination for trial purposes as well, only minor amendments to the present language of the bill will be necessary." *Id.* at 1902. Congress has never made those amendments.

Soon after the MDL process got underway, a peculiar thing started happening: Judges began to develop proprietary feelings toward the cases entrusted to them; they began using 28 U.S.C. § 1404(a), the venue transfer statute, to hold on to these cases for trial. Some judges worried that such transfers were not authorized: "I must recognize candidly," wrote Judge Bownes, then of the District of New Hampshire, "that there is nothing in the language of 28 U.S.C. § 1407(a) or 1404(a) which directly allows, or even suggests, that the transferee judge has the power to transfer cases to his district, or any district, for purposes of trial." *In re Air Crash Disaster Near Hanover, New Hampshire*, 342 F.Supp. 907, 909 (D.N.H.1971). Such scruples were cast aside after the Second Circuit's opinion in *Pfizer, Inc. v. Lord*, 447 F.2d 122, 124-25 (2d Cir.1971), a case that proved unusually influential, perhaps because retired Associate Justice Tom Clark was a member of the two-judge panel that authored the opinion.

Since *Pfizer*, this practice (known as "self-transfer") has become a routine aspect of the MDL process. The JPML has blessed self-transfer by its Rule 14(b), which provides that the Panel will not send a case back for trial if the district court handling pretrial matters transfers the case to itself, and by caselaw holding that the JPML will not even consider remanding so long as the district court is considering a self-transfer motion. *See In re CBS Color Tube Patent Litig.*, 342 F.Supp. 1403, 1405 (J.P.M.L. 1972) ("In view of the pendency of [a § 1404(a)] motion, we expressly refrain from granting this motion for remand and interfering in matters within the discretion of the transferee judge.").[1]

The majority thus has ample company in holding that a district judge to whom a case has been sent for pretrial under section 1407(a) may latch onto it by ordering a section 1404(a) self-transfer. *See* maj. op. at 1532. Every court that has examined the issue since *Pfizer* has held or assumed that such authority exists.[2] But a close

[1] It is for this reason that the majority's suggestion that Lexecon somehow waived its right to seek return of the case to the Northern District of Illinois is ill founded. *See* maj. op. at 1533-34. Under the Panel's rules and precedent, the JPML will not normally consider a transfer without a recommendation from the district judge. *See, e.g.*, J.P.M.L.R.Proc. 14(d) ("The Panel is reluctant to order remand absent a suggestion of remand from the transferee district court."); *In re A.H. Robbins Co.*, 453 F.Supp. 108, 110 (J.P.M.L. 1978); *In re Holiday Magic Securities & Antitrust Litig.*, 433 F.Supp. 1125, 1126 (J.P.M.L. 1977) (both noting that, absent a suggestion from the transferee court, a party seeking remand from the JPML bears a heavy burden of persuasion). Lexecon—in compliance with this authority—petitioned the district court in August 1994 to refer the case back to the JPML because all possible coordinated discovery had concluded. The district court stayed consideration of this motion pending the end of discovery. Lexecon renewed its remand request at the close of discovery in November 1994. In December 1994, defendants moved for a section 1404(a) transfer, and in March 1995, the district court granted the transfer to itself, while simultaneously denying Lexecon's remand request.

Lexecon surely cannot be faulted for following the JPML rules by petitioning the district court twice for a referral and awaiting its ruling. And, by the time the court denied the motion, it had transferred the case to itself, which made the case off limits for further action by the Panel. *See* J.P.M.L.R.Proc. 14(b). The majority's charge that Lexecon—which went so far as to seek a writ of mandamus from our court—"failed to seek succor" for its wrongs, maj. op. at 1534, is a sucker-punch.

[2] *See* maj. op. at 1532 & n. 3 (citing *In re Food Lion, Inc., Fair Labor Standards Act Litig.*, 73 F.3d 528, 532 n. 7 (4th Cir.1996);

look at this caselaw reveals a remarkable lack of critical attention to this issue, with almost every court relying on *Pfizer* as the sum and substance of its analysis.[3] In fact, *Pfizer*, with its one page of analysis, is the only court of

Washington Pub. Util. Group v. United States Dist. Ct., 843 F.2d 319, 326 (9th Cir.1987); *In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1178 (D.C.Cir.1987), *aff'd*, 490 U.S. 122, 109 S.Ct. 1676, 104 L.Ed.2d 113 (1989); *Kohr v. Allegheny Airlines*, 504 F.2d 400, 402 (7th Cir. 1974), *cert. denied*, 421 U.S. 978, 95 S.Ct. 1980, 44 L.Ed.2d 470 (1975); *In re Mahurkar Double Lumen Hemodialysis Catheter Patent Litig.*, 750 F.Supp. 330, 332 (N.D.Ill.1990); *In re Air Crash Disaster Near Chicago*, 476 F.Supp. 445, 450 (J.P.M.L.1979); *In re CBS Color Tube*, 342 F.Supp. at 1404-05).

[3] *See, e.g., Washington Pub. Util. Group*, 843 F.2d at 326; *In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d at 1178 n. 7; *In re Fine Paper Antitrust Litigation*, 685 F.2d at 820 n. 7; *Eastern Air Lines, Inc. (In re Air Crash Disaster at Florida Everglades on Dec. 29, 1972)*, 549 F.2d at 1009 n.4; *In re Air Crash Disaster at Detroit Met. Airport on Aug. 16, 1987*, 737 F.Supp. 391, 394 n. 4 (E.D.Mich.1989); *In re Tax Refund Litig.*, 723 F.Supp. 922, 924 (E.D.N.Y.1989); *In re Air Crash Disaster at Stapleton Int'l Airport, Denver, Colo., on Nov. 15, 1987*, 720 F.Supp. 1455, 1458 (D.Colo.1988); *In re Dow Co. "Sarabond Products" Liab. Litig.*, 664 F.Supp. 1403, 1403-04 (D.Colo.1987); *In re Air Crash Disaster at John F. Kennedy Int'l Airport on June 24, 1975*, 479 F.Supp. 1118, 1122-23 (E.D.N.Y.1978); *In re Air Crash Disaster Near Chicago*, 476 F.Supp. at 450; *In re Anthracite Coal Antitrust Litig.*, 436 F.Supp. 402, 403-04 (J.P.M.L.1977); *In re Bristol Bay, Alaska, Salmon Fishery Antitrust Litig.*, 424 F.Supp. 504, 507 (J.P.M.L.1976); *In re Bomb Disaster at Roseville, Cal., on April 28, 1973*, 399 F.Supp. 1400, 1403 (J.P.M.L.1975); *In re Caesars Palace Securities Litig.*, 360 F.Supp. 366, 374 (S.D.N.Y. 1973); *In re Aircrash Near Duarte, Cal., on June 6, 1971*, 357 F.Supp. 1013, 1015 (C.D.Cal.1973); *In re CBS Color Tube Patent Litig.*, 342 F.Supp. at 1405 n. 2; *In re Air Crash Disaster at Huntington, W. Va., on Nov. 14, 1970*, 342 F.Supp. 1400, 1403 n. 4 (J.P.M.L.1972); *Greyhound Computer Corp. v. I.B.M. Corp.*, 342 F.Supp. 1143, 1145 (D.Minn.1972); *In re Viatron Computer Systems Corp. Litig.*, 86 F.R.D. 431, 432-33 (D.Mass.1980); *In re Master Key Antitrust Litig.*, 70 F.R.D. 23, 28 (D.Conn.1975); *In re Penn Central Commercial Paper Litig.*, 62 F.R.D. 341, 345 (S.D.N.Y. 1974), *aff'd*, 515 F.2d 505 (2d Cir.1975) (all relying on *Pfizer*).

appeals opinion that seriously addresses the issue; most merely *refer* to the practice on the way to tackling other questions.[4] A lot of cases thus seem to sanction the practice, but not a single case after *Pfizer* has taken an independent look at the issue or dealt with the difficult questions it raises.

[4] *In re Korean Air Lines Disaster of Sept. 1, 1983* dealt with whether the *Van Dusen* rule—that the state law applicable in the transferor forum attends the transfer—should apply to transferred federal claims. *See* 829 F.2d at 1174. Although Judge Douglas Ginsburg in his concurrence does mention the self-transfer practice, *see id.* at 1178 (D.H. Ginsburg, J., concurring), Judge Ruth Bader Ginsburg writing for the court describes section 1407(a) as "a statute authorizing transfers only for pretrial purposes." *Id.* at 1174. The Fourth Circuit also made passing reference to this practice in a footnote, *see In re Food Lion, Inc., Fair Labor Standards Act Litig.*, 73 F.3d at 532 n. 7, on its way to addressing the issue in that case—when parties may appeal dispositions in the transferee court. Significantly, the Fourth Circuit noted, "Although Congress has not yet seen fit to allow the Panel or the transferee court to consolidate cases for trial, this is possibly a next step." *Id.* at 532. Our circuit and the Fifth have also noted the practice, but declined to address its legitimacy because the parties hadn't raised the issue. *See Washington Pub. Util. Group v. United States Dist. Ct.*, 843 F.2d 319 at 326 (the parties "disagree only as to whether the court properly applied [section 1404(a)]"); *Gordon v. Eastern Air Lines, Inc. (In re Air Crash Disaster at Florida Everglades on Dec. 29, 1972)*, 549 F.2d at 1009 n. 4 ("The parties have not raised the question whether [a court can transfer an MDL case to itself;] therefore we do not reach it."). The Seventh Circuit has twice reported that the practice exists when recapping the factual history of cases that dealt with issues unrelated to the self-transfer question. *See Eckstein v. Balcor Film Investors*, 8 F.3d 1121 (7th Cir. 1993), *cert. denied*, 510 U.S. 1073, 114 S.Ct. 883, 127 L.Ed.2d 78 (1994); *Kohr*, 504 F.2d at 402.

Only the Third Circuit has seemingly blessed this practice. *See In re Fine Paper Antitrust Litigation*, 685 F.2d at 810. But the Third Circuit, in the single paragraph it devotes to the subject, doesn't even mention the possible conflict with section 1407(a), effectively assuming that self-transfer in the MDL context is appropriate. *See id.* at 819-20. Moreover, the Third Circuit's analysis consists primarily of a block quote from, you guessed it, *Pfizer*. *See id.* at 820 n. 7.

While the federal courts have treated *Pfizer* as dispositive, commentators have been far more skeptical. With remarkable unanimity, they have questioned whether, and under what circumstances, district judges to whom cases are entrusted for purposes of discovery may hold on to them for trial. *See, e.g.*, 15 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3866, at 619 (2d ed. 1986) ("More questionable is the practice of the Section 1407 judge transferring the cases to himself for all purposes under Section 1404(a) of Title 28 . . . thereby giving the transferee court the ability to conduct the trial."); Robert H. Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 Cornell L.Rev. 779, 809 (1985) ("[I]t seems clear that the lower federal courts have done by judicial fiat what Congress refused to do by statute in 1969: amend section 1407 to allow transfers for trial."); Ross D. Cooper, *The Korean Air Disaster: Choice of Law in Federal Multidistrict Litigation*, 57 Geo.Wash.L.Rev. 1145, 1164 (1989) (similar); Mike Roberts, *Multidistrict Litigation and the Judicial Panel, Transfer and Tag-Along Orders Prior to a Determination of Remand: Procedural and Substantive Problem or Effective Judicial Public Policy?*, 23 Mem.St.U.L.Rev. 841, 866 (1993) ("It is a leap in logic to conclude that causes of action not terminated upon dispositive motions should be retained in the transferee court under the rubric of § 1404(a), when the statutory language of §1407 explicitly directs remand to the transferor court."); *Report of the American Bar Association Section of Antitrust Law Task Force to Review the Supreme Court's Decision in California v. ARC American Corp.*, 59 Antitrust L.J. 273, 302 (1990) ("[T]he use of Section 1404(a) transfers to consolidate multidistrict cases for trial is of dubious legal validity."); Blake M. Rhodes, Comment, *The Judicial Panel on Multidistrict Litigation: Time for Rethinking*, 140 U.Penn.L. Rev. 711, 734 (1991) ("[A] transferee court's use of § 1404(a) sets Congress's carefully crafted plan for multi-

district litigation on its head."); Stanley J. Levy, *Complex Multidistrict Litigation and the Federal Courts*, 40 Fordham L.Rev. 41, 64 (1971) (the language and legislative history of section 1407(a) are so clear that it "originally appeared to be a futile exercise for a 1407 transferee court to rule on a 1404 transfer motion."); John F. Cooney, Comment, *The Experience of Transferee Courts Under the Multidistrict Litigation Act*, 39 U.Chi.L.Rev. 588, 606 (1972) ("[T]he apparently mandatory nature of the remand clause . . . implies that transferee courts lack this jurisdiction [to grant a section 1404 motion]."); George T. Conway III, Note, *The Consolidation of Multistate Litigation in State Courts*, 96 Yale L.J. 1099, 1102-03 (1987) ("[C]onsolidation for trial almost certainly defies both the letter of section 1407 and the intent of its drafters." (footnotes omitted)); Note, *The Judicial Panel and the Conduct of Multidistrict Litigation*, 87 Harv.L. Rev. 1001, 1030-31 (1974) (legislative history of section 1407 emphasizes it would be used only for pretrial proceedings).

Research discloses not a single commentator who has examined the question and found statutory support for the position taken by the federal courts. Seldom have courts and commentators diverged so widely in their treatment of a legal issue.

Self-transfer under section 1404(a), in fact, raises three tough legal questions. The first is whether a district judge to whom a case is transferred for "coordinated or consolidated pretrial proceedings" under section 1407 is authorized to pass on a section 1404(a) change of venue motion. The answer is not self-evident. A venue transfer motion is, to be sure, a pretrial motion and therefore arguably within the authority of the transferee court conducting "coordinated or consolidated pretrial proceedings." But there must be *some* pretrial motions MDL courts are not authorized to rule upon because section 1407(a) does not transfer the case for the conduct of all pretrial proceedings, only those that are "coordinated or consoli-

dated." The statutory language seems to limit the MDL court's authority to motions that implicate more than a single case—something that venue transfer motions, which call for an "individualized, case-by-case consideration of convenience," do not. *Van Dusen v. Barrack*, 376 U.S. 612, 622, 84 S.Ct. 805, 812, 11 L.Ed.2d 945 (1964); *see also Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 29, 108 S.Ct. 2239, 2243-44, 101 L.Ed.2d 22 (1988) ("A motion to transfer under § 1404(a) . . . calls on the district court to weigh in the balance a number of case-specific factors. . . .").[5]

The legislative history bears out this interpretation; Congress apparently understood the term "pretrial proceedings" to "generally involve deposition and discovery." H.Rep. No. 1130, *in* 1968 U.S.C.C.A.N. at 1900. A venue transfer motion is not a discovery motion. In fact, a proper application of section 1404(a) often depends on information obtained through discovery, so venue transfer motions are seldom considered before discovery closes. *See, e.g., In re Equity Funding Corp. of America Sec. Litig.*, 416 F.Supp. 161, 178-79 (C.D.Cal.1976); Stanley A. Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts*, 78 F.R.D. 575, 582 (1978); David F. Herr, *Multidistrict Litigation: Handling Cases Before the Judicial Panel on Multidistrict Litigation* 80 (1986); Robert J. Ward, *Multidistrict Litigation Procedures in the United States, in* The Trial Lawyer's Guide, at 249, 256 (John J. Kennelly ed. 1982) (all noting that transferee courts regularly postpone decisions on

[5] As I note below, shoehorning venue transfers into the concept of "coordinated or consolidated pretrial proceedings" requires a dramatic recalibration of the section 1404(a) calculus. *See* pp. 1546-49 *infra*. That MDL courts are unable to achieve consolidation for trial without twisting the standards of section 1404(a) beyond recognition ought to be a further clue that MDL courts have no business passing on venue transfer motions.

section 1404(a) motions until discovery is completed).[6] There is, therefore, a plausible case for holding that venue transfer motions are not among the powers of an MDL court.

And there is an excellent practical reason for so interpreting section 1407(a): If the MDL court grants a venue transfer motion, it cuts off the JPML's ability to comply with its statutory directive that it "shall" remand the case "to the district from which it was transferred." As one commentator noted, therefore, a change of venue motion "is of an entirely different nature than the powers" Congress intended to give MDL transferee courts. Trangsrud, 70 Cornell L.Rev. at 807.

It is true that an MDL court can dispose of the case by settlement or motion and thus prevent the JPML from remanding it.[7] But that is a possibility expressly accounted

[6] This was certainly the case here, as Judge Roll postponed deciding Lexecon's first change of venue motion (its initial remand request) until the end of discovery, at which time Milberg Weiss made its motion seeking self-transfer. Once discovery is completed, however, consolidated proceedings have ceased and there is no justification for allowing the transferee court to rule on the venue transfer motion; the motion could, just as easily, be ruled on by the originating district court after the case is remanded by the JPML.

Habitual procrastination of venue transfer decisions by MDL courts is ironic considering *Pfizer*'s big worry that, if the transferee court does not have authority to rule on a change of venue motion, no court would be able to do so during the course of pretrial proceedings. *See Pfizer*, 447 F.2d at 125 ("[T]o hold that the transferee court . . . has no section 1404(a) authority would mean that all proceedings on any section 1404(a) motion would have to be suspended for the entire period of pretrial. . . ."). This concern was especially misplaced because, so long as the case is partaking of "coordinated or consolidated pretrial proceedings" there is no need to transfer venue; indeed, any such transfer would defeat the purpose for which the case was consolidated in the first place.

[7] What kind of dispositive motions the MDL transferee court may rule on was once a subject of great controversy, but transferee courts, with the JPML's approval, now largely assume unlimited

for in section 1407(a), which releases the JPML from its obligation to transfer the case back to its originating district if "it shall have been previously terminated." 28 U.S.C. § 1407(a). Had Congress also meant to release the JPML from its obligation in cases where venue is changed pursuant to section 1404(a), it could have said so. In fact, Congress said quite the opposite, at least in the legislative history of section 1407(a), where it repeatedly noted that the new statute "would not affect the place of trial in any case," H.Rep. No. 1130, *in* 1968 U.S.C.C.A.N. at 1900, and that "trial in the originating district is generally preferable from the standpoint of the parties and witnesses." *Id.* at 1901; *see* Roberts, 23 Mem.St.U.L.Rev. at 868 ("Clearly, the exact legislative history specifies that Congress never intended § 1407 by itself or . . . [through] tandem use with § 1404(a) . . . to alter the venue of ultimate trial.").[8]

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authority. *See* Levy, 40 Fordham L.Rev. at 60-61; *see also* Comment, *The Experience of Transferee Courts*, 39 U.Chi.L.Rev. at 588-89 ("After an initial period of hesitancy, transferee courts have steadily increased their control over pretrial proceedings far beyond the role envisioned by the drafters of the statute."). In fact, there is good reason to believe that Congress did not intend transferee courts to wield such unlimited authority. Had Congress wanted to authorize consolidated summary judgment procedures, it would have authorized the JPML to consolidate cases that presented common legal questions. Instead, Congress authorized consolidation only of cases that present "common questions of fact." Naturally, the JPML quickly ignored this limitation as well, and now routinely transfers cases where only common questions of law are at issue. *See, e.g.*, Levy, 40 Fordham L.Rev. at 48.

Whatever the *scope* of the MDL court's power to issue dispositive pretrial orders, the *duration* of that power cannot extend beyond the time when "coordinated or consolidated pretrial proceedings" come to an end. At that point, there's no further justification for keeping the case in the MDL process and hence no authority for the MDL transferee court to enter further orders.

[8] The majority takes comfort from passages of legislative history that in fact support my view. *See* maj. op at 1532-33. The first

It makes perfect sense for Congress to permit the transferee court to handle most pretrial legal issues—including some dispositive motions—and still insist that trial (if

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passage quoted by the majority clearly says that venue transfer under section 1407(a) is for the "limited purpose of conducting coordinated pretrial proceedings" and that "[i]t would not affect the place of trial in any case." H.Rep. No. 1130, *in* 1968 U.S.C.C.A.N. at 1900. Presumably, the majority relies on the portion of the quote which states that section 1407(a) would not "exclude the possibility of transfer under other Federal statutes." *Id.* I don't see how this helps the majority a bit. The passage merely affirms that, while the MDL statute would provide a special mechanism for transferring cases for pretrial purposes, all other venue transfer provisions remain in effect once the MDL procedure ends and the case is remanded. It surely couldn't have meant that transferee courts have the power to keep cases for trial when the rest of the quote says just the contrary.

The majority's second block quote is no more helpful. Presumably, again, the majority intends to emphasize the portion of the quote which allows, "Of course, 28 U.S.C. § 1404, providing for changes of venue generally, is available in those instances where transfer of a case for all purposes is desirable." *Id.* at 1902. But the majority omits, by way of an ellipsis, the two sentences preceding this quote, which help put it in perspective:

> Additionally, trial in the originating district is generally preferable from the standpoint of the parties and witnesses, and from the standpoint of the courts it may be impracticable to have all cases in mass litigation tried in one district. Additionally, the committee recognizes that in most cases there will be a need for local discovery proceedings to supplement coordinated discovery proceedings, and that consequently remand to the originating district for this purpose will be desirable.

Id. Nor does the majority quote the sentence that immediately succeeds its quote: "If proposed section 1407 should be enacted and future experience justifies extending it to include consolidation and coordination for trial purposes as well, only minor amendments to the present language of the bill will be necessary." *Id.* Sandwiched between these provisions, which make it clear that Congress was not intending to authorize MDL transferee courts to keep the cases sent to them for coordinated discovery, the sentence referring to section 1404 could only have been intended as another acknowledg-

there be one) be conducted in the district where the complaint was filed. Trial is a unique part of the litigation process in that it involves fact-finding, usually by a jury. Congress may have felt that federal judges are fungible for purposes of resolving legal questions, but that jurors—who reflect the sense of the community in adjudicating the rights and liabilities of their neighbors—are not. Congress also may have been willing to deny plaintiffs control over the pretrial forum, but thought it unfair to deny them control over the place of trial because jurors in the transferee district may have "background[s] . . . so different from that of jurors in [the transferror district] as to deprive plaintiffs of their constitutionally guaranteed right to a trial by a jury of their peers." *In re Air Crash Disaster Near Hanover, New Hampshire*, 342 F.Supp. at 910.

Even assuming MDL transferee courts have authority to pass on ordinary venue motions, there is a second major question: May a court ever grant a motion to transfer venue *to itself?* Again, it helps to read the applicable statute, which in plain and simple terms provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any *other* district or division where it might have been

ment that the new MDL statute would not preclude normal venue transfers by the court where the case was originally filed.

In any event, vague allusions in the committee reports cannot override the clear statutory language of section 1407, which effectively forecloses venue transfers during the pendency of MDL procedures. This is precisely what one commentator who analyzed section 1407 before its enactment concluded: "[C]learly the [Coordinating C]ommittee's language [which was adopted into the House and Senate reports] is too ambiguous to provide any substantial justification for a court's reading section 1407 in a way opposed to its literal prohibition of transfers." Comment, *Consolidation of Pretrial Proceedings Under Proposed Section 1407 of the Judicial Code: Unanswered Questions of Transfer and Review*, 33 U.Chi.L.Rev. 558, 562 (1966). This commentator seems to have underestimated the creativity of federal judges.

brought." 28 U.S.C. § 1404(a) (emphasis added). I don't see how this language can be read to authorize a district court to transfer a case to itself. *See* Rhodes, 140 U.Penn.L.Rev. at 740 ("A transferee court using § 1404(a) is not transferring a case to *another* district. It is simply proclaiming trial jurisdiction over the case." (emphasis in original)). Indeed, the drafters of section 1404(a) could not possibly have meant to authorize self-transfers because that section long predates section 1407; the possibility that a district court would be in a position to transfer a case to itself was not something anyone at the time could have anticipated.[9] Thus, this is not a case where the statutory language imperfectly reflects the intention of the drafters. The language of section 1404(a) precisely matches the understanding of the Congress that enacted it.

Are the federal courts nevertheless justified in tweaking section 1404(a) to make it yield up an authorization for self-transfer in the MDL context? Even under the best circumstances such judicial legerdemain would be awk-

[9] Defendants make a Rube Goldberg argument that Lexecon's case was, in fact, transferred to *another* district: Although transferred temporarily for pretrial purposes, the case was still technically pending in the Northern District of Illinois when the section 1404(a) transfer moved it to the District of Arizona, an "other district . . . where it might have been brought." *See* Br. of Milberg Defendants and of Cross-Appellant Milberg Weiss, at 25. Defendants seem to think that section 1404(a) merely requires that a case be transferred from one court to another.

This argument makes no linguistic sense because section 1404(a) provides that *"a district court* may transfer any civil action to any *other* district . . ." 28 U.S.C. § 1404(a) (emphasis added). The phrase "any other district," which specifies the receiving court, stands in contrast to the earlier phrase "a district court," which refers to the court making the transfer. Or, to put it differently, the term "other district" must relate back to the term "district" within the same sentence. Thus, the court making the transfer cannot, under the terms of section 1404(a), be the same as the court receiving the transfer.

ward because it would require us to ignore the term "other" in section 1404(a). But these are not ideal circumstances because such manipulation creates a power that Congress considered giving federal courts but expressly *rejected*. *See* p. 1540 *supra*.

This, then, is not a case where Congress passed two laws at different times and forgot to harmonize them. Congress, rather, made a deliberate choice to leave trial of cases subject to the MDL process in the district where they were filed. Given section 1407(a)'s explicit command that cases be remanded for trial in the district where they were filed, and legislative history making it clear that this was a deliberate choice, I don't see how we can possibly fudge section 1404(a) to make it authorize self-transfer.

This question was not raised in *Pfizer* and no other federal court of appeals has ever considered it. The issue has been noted by commentators, and they have all concluded that self-transfer is not authorized by section 1404(a). *See, e.g.*, Rhodes, 140 U.Penn.L.Rev. at 740-41 (arguing that using section 1404(a) in this way amounts to "creat[ing] a new 'venue' statute *sua sponte*.").

Even if we could overcome these first two hurdles, there is a third, equally daunting, one. Section 1404(a), at least as interpreted outside the MDL context, carries a strong presumption that plaintiff's choice of forum will not be disturbed. The presumption can be overcome only by a *compelling* showing that the convenience of parties and witnesses will be served by the transfer. *See* 15 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, § 3848, at 383. This interpretation of section 1404(a) is consistent with the traditional rule, which gave plaintiffs almost complete power to select the forum, *see Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508, 67 S.Ct. 839, 843, 91 L.Ed. 1055 (1947) ("[T]he plaintiff's choice of forum should rarely be disturbed."), and a judicial recognition that, by

passing section 1404(a), Congress intended to disturb the plaintiff's choice of forum only for very strong reasons.[10]

In the MDL context, the traditional forum deference afforded plaintiffs disappears entirely. It's as if MDL courts are applying a mutated version of section 1404(a), one where a plaintiff's right to pick its venue has devolved to the significance of a tailbone or an appendix. Thus, MDL courts seldom even consider the rights of plaintiffs to their chosen forums, much less give this factor controlling weight. *See, e.g., Transgrud*, 70 Cornell L.Rev. at 809 ("When confronted with section 1404(a) motions, transferee courts have denied transfers only where those transfers would have put the parties in an improper venue or were requested prematurely."). Instead, concerns for judicial economy trump all others: "Since [a section 1404(a) transfer in the MDL context] involve[s] multiple cases, the rights, interests, and convenience of the individual parties [are] swept aside in the drive toward apparent judicial economy." Levy, 40 Fordham L.Rev. at 65; *see also* 15 Wright et al., § 3867, at 626 (when granting section 1404(a) transfers "notions of party and witness convenience, which typically are at the heart of transfer motions under Section 1404(a), may be subordinated to the type of judicial economy concerns that are central to Section 1407"); Richard A. Chesley & Kathleen W. Kolodgy, *Mass Exposure Torts: An Efficient Solution to*

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[10] The Supreme Court in *Norwood v. Kirkpatrick*, 349 U.S. 29, 75 S.Ct. 544, 99 L.Ed. 789 (1955), upheld a section 1404(a) transfer away from a plaintiff's home forum, which would have been impermissible under the traditional forum non conveniens doctrine. The Court reasoned that section 1404(a) was intended to broaden the power of courts to order venue transfers. "[N]evertheless it has been consistently held since that decision that plaintiff's choice of a forum will not be disturbed unless the balance of convenience weighs heavily in favor of defendant." *Franklin v. Blaylock*, 218 F.Supp. 261, 262 (S.D.N.Y.1963), *aff'd sub nom. Blaylock v. McLean*, 319 F.2d 533 (2d Cir.1963) (citations omitted); *see also* Stephen C. Yeazell et al., *Civil Procedure* 193 (3d ed. 1992).

a Complex Problem, 54 U.Cin.L.Rev. 467, 525 (1985) ("[T]he efficiency standards of section 1407 many times overshadow the important individual concerns that the courts examine under section 1404.").

Section 1404(a), thus, has not only been conscripted by the federal courts to serve ends Congress never had in mind for it, it has also been stripped of the prudential constraints designed to protect plaintiff's choice of forum. What this means in practice is that self-transfers are not occasional, isolated events based on an unusually strong showing of judicial economy; they are the norm. The simple reality is that once a case is sucked into the MDL vortex, it seldom comes back. *See In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d at 1178 (D.H. Ginsburg, J., concurring) ("In practice, the vast majority of transferred cases are so resolved, and do not return to the transferor courts."); *In re New York City Municipal Secs. Litig.*, 572 F.2d 49, 51 (2d Cir.1978) ("[H]istory has indicated that once the limited transfer has occurred, the transferor district is not likely to see the case again.").[11]

No case better illustrates the dangers of this practice than the one now before us. Applying normal 1404(a) standards, a venue transfer of this case from Chicago to Arizona would never have been granted; the convenience of the parties and witnesses would not have been served by such a transfer, much less clearly outweighed plaintiffs' right to choose their forum. Of the four witnesses who testified at trial, two were from Chicago, none from Arizona.[12] Plaintiffs were from Chicago, defendants from California but represented by a lawyer from Chicago. The

[11] I've found no case where an MDL court has been reversed for transferring a case to itself for trial.

[12] Of the 42 witnesses whose depositions had been noticed or taken at the time the request for remand was filed by Lexecon, only one was from Arizona. *See* Plaintiffs' Motion to Remand at 9. A very fine witness, to be sure, but still only one.

only connection between this case and Arizona was the trial judge.

Nor was the "interest of justice" clearly served by transfer to Arizona for trial. The trial lasted only five days and turned on Illinois law. *See Lexecon v. Milberg Weiss*, 884 F.Supp. 1388 (D.Ariz.1995) (applying Illinois law to Lexecon's defamation claim). Any advantage Judge Roll might have enjoyed in dealing with the facts was offset by the advantage a Chicago district judge would have had in instructing the jury as to Illinois law.[13]

No matter how you jiggle these factors, it's hard to come up with a plausible argument that trial in Arizona was more appropriate than trial in Chicago. Yet, as section 1404(a) is normally interpreted, a plaintiff's choice of forum can only be overcome if the transferee district is *clearly* more advantageous than the transferor district. Plaintiff's selection of its own home forum, when that forum is related to the subject matter of the suit, is entitled to even greater deference because both plaintiff and the community have an interest in resolving the controversy at home. *See, e.g., General Foam Plastics Corp. v. Kraemer Export Corp.*, 806 F.Supp. 88, 89 (E.D.Va. 1992); *Continental Airlines, Inc. v. American Airlines, Inc.*, 805 F.Supp. 1392, 1395-96 (S.D.Tex.1992).[14] In-

[13] This was not even a situation where the parties and witnesses were already going to trial on related claims so it would have been convenient to try this case at the same time. *Cf. In re Fine Paper*, 685 F.2d at 820 ("[P]laintiffs' convenience was outweighed by the comparative economy of trying one case in the Eastern District rather than several actions in the [plaintiffs'] home districts."). All other cases involving Lincoln Savings had long since been resolved.

[14] The rationale behind this rule is brought home by considering whether a Chicago or Arizona jury would better appreciate the following attempt by Lexecon's counsel to evoke sympathy for his client during summation:

stead, Lexecon was forced to trial in a forum where there was much popular feeling against Lincoln Savings, Charles Keating and those (like plaintiffs) who were associated with them.[15] It was also a forum where a respected district judge felt so strongly that plaintiffs' claim was unjustified that he found it necessary to recuse himself. *See* maj. op. at 1529.[16]

> And as a kid, I used to go into Chicago and see these great skyscrapers, and through them you would see Lake Michigan glimmering in the distance. And about this time of the year, the pavement would shimmer with heat. About right now in Chicago, people in Lexecon are getting out of work and they are going to their cars and going to the subway, and they are thinking maybe about what is happening out here, and wondering: Will Lexecon continue to be the kind of fine organization that Dan Fischel built it to be? Will they have a future?

RT at 234-35 (July 31, 1995).

[15] Not surprisingly, defense counsel peppered his arguments with references to Charles Keating's misdeeds and defendants' attempts to recover money for the victims, whom counsel described as "those retired people, the 23,000 people who got robbed, raped and peltered [sic] by Charles Keating." RT at 187 (July 31, 1991). Defense counsel also made much of the fact that, by settling the *Lincoln Savings* case, Lexecon avoided the verdict of an Arizona jury, and then ran off to Chicago and filed suit. *See id.* at 215 ("Now, as I said [before], if Lexecon wanted vindication, it could have taken its case to the jury. It did not. It paid $700,000. That is fine. But then it shouldn't have gone back to Chicago and thrown that $15 million brick at [defendants by filing suit]. It shouldn't have done that.").

[16] As the majority notes, Judge Bilby went so far as to amend the record in the earlier proceeding by entering an order explicating his view of the settlement and deriding Lexecon for having brought this lawsuit. Judge Bilby no doubt was sincere in his views but his order amounted to little more than testimony about his perception of the settlement. As this statement was not subject to the normal safeguards applicable to witnesses—such as cross-examination and impeachment—I find it troubling that the majority relies on it in characterizing Lexecon's case. *See* maj. op. at 1529-30.

Although Judge Roll had nothing to do with this order, he may have been influenced by his colleague's strong feelings, and thus

In ordering the self-transfer, the district court did not consider *any* of the traditional section 1404(a) factors. The court simply noted its familiarity with the case and concluded that it would be wasteful to have another judge conduct the trial. *See* Order, May 2, 1995. Such considerations of judicial economy—standing alone—have never before been sufficient to justify a section 1404(a) transfer. *See, e.g., Warrick v. General Electric Co.*, 70 F.3d 736, 740 (2d Cir.1995) (per curiam) (judicial economy "is not alone sufficient" to justify a transfer); *Wash. Pub. Util. Group*, 843 F.2d at 326 ("[A] federal court may not order transfer under section 1404(a) solely for its convenience."); *Codex Corp.*, 553 F.2d at 739 ("[W]e have found no case where [the desire for consolidation] has carried the day against factors pointing in the other direction."); *Max Planck v. General Elec. Co.*, 858 F.Supp. 380, 382 (S.D.N.Y. 1994) (noting that court expertise with the subject matter of a case is an "irrelevant" consideration under section 1404(a)). If familiarity with the case in a five-day, four-witness, one-horse trial is sufficient to justify a section 1404(a) transfer, the case simply does not exist where judicial economy will not trump a plaintiff's right to a trial in his home district.

The majority points to JPML Rule 14(b) as authority for Judge Roll's action. *See* maj. op. at 1533 n. 7. But the rule governs only the internal procedures of the JPML,

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"we [might] consider prior judicial experience in such a situation more a negative than an affirmative reason for transfer." *Codex Corp. v. Milgo Electronic Corp.*, 553 F.2d 735, 739 (1st Cir.), *cert. denied*, 434 U.S. 860, 98 S.Ct. 185, 54 L.Ed.2d 133 (1977). Moreover, defense counsel repeatedly referred to the sentence from Judge Bilby's order characterizing Lexecon's complaint as "a false description of the conditions under which [it] was dismissed from [the *Lincoln Savings*] case." Defense counsel made sure the jury understood just who Judge Bilby was: "Judge Bilby learned of this lawsuit and Judge Bilby entered an order. The judge sitting across the street, the former Chief Judge of this district." RT at 193 (July 31, 1995).

not the authority of the district court. *See* J.P.M.L.R.Proc. 14(b) ("In the event that the transferee judge so transfers an action under 28 U.S.C. § 1404(a) or 1406, no further action of the Panel shall be necessary to authorize further proceedings including trial."). Nor could it, since section 1407(f) only empowers the JPML "to prescribe rules for the conduct of *its* business." 28 U.S.C. § 1407(f) (emphasis added).[17]

But even if Rule 14(b) somehow purported to do what the majority ascribes to it, we would still have to consider what weight to attribute to it. JPML rules are not subject to the rigorous promulgation process of the Rules Enabling Act: They are not voted upon by the Judicial Conference of the United States; they are not adopted by the Supreme Court; they are not put before Congress for possible modification or rejection. *See* 28 U.S.C. §§ 2072-74. Nor do they have the dignity of executive branch regulations promulgated pursuant to a substantive grant of rule-making authority. *See Chevron U.S.A. v. NRDC*, 467 U.S. 837, 843-44, 104 S.Ct. 2778, 2781-83, 81 L.Ed.2d 694 (1984). The JPML's rules have the force of local district court rules, which are authorized by a statute almost identical to section 1407(f). *See* 28 U.S.C. § 2071(a) ("[A]ll courts established by Act of Congress may from time to time prescribe rules for the conduct of their business."). As such, they are entitled to deference

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[17] The JPML itself takes the position that it has no authority to tell MDL transferee courts what actions to take in the cases entrusted to them, including whether to grant section 1404(a) venue transfers. *See, e.g., In re Air Crash Disaster Near Chicago*, 476 F.Supp. at 450 ("[T]he Panel has neither the authority nor the desire to control decisions of the transferee judge made in the actual conduct of coordinated or consolidated pretrial proceedings[, including section 1404(a) determinations]."); *In re Westinghouse Electric Corp. Uranium Contract Litig.*, 436 F.Supp. 990, 996 (J.P.M.L.1977) ("The Panel has neither the power nor the inclination to dictate in any way the manner in which judges process actions pending before them.").

only to the extent they cover the JPML's business; they cannot broaden the transferee court's authority to act under section 1404(a). *See* 12 Wright et al., § 3153, at 228 ("[A] local rule is invalid if it makes 'basic procedural innovations' that should be left to the rulemaking power of the Supreme Court, surrounded, as that is, by statutory procedures that ensure mature consideration of informed opinion." quoting *Miner v. Atlass*, 363 U.S. 641, 650, 80 S.Ct. 1300, 1305-06, 4 L.Ed.2d 1462 (1960)); *see also* Jack B. Weinstein, *Reform of the Federal Rulemaking Process*, 63 A.B.A.J. 47, 47 (1977) ("There is no real opportunity even to challenge [local] rules in litigation since the judges who will decide the case are often the ones who adopted the rules.").

The majority also takes comfort from the fact that it reaches a result that is consistent with current practice—which must be the case given how seldom cases are returned for trial in the original district once they become ensnared in the MDL web. But a practice unsupported by thoughtful analysis, one that flies in the face of three clear statutory commands, surely is entitled to little weight. Moreover, this is not a case where we can read congressional silence as signifying approval of a particular statutory interpretation, a doctrine that is "at best treacherous," *Girouard v. United States*, 328 U.S. 61, 69, 66 S.Ct. 826, 829-30, 90 L.Ed. 1084 (1946), and at worst "a canard." *Johnson v. Transportation Agency*, 480 U.S. 616, 672, 107 S.Ct. 1442, 1472-73, 94 L.Ed.2d 615 (1987) (Scalia, J., dissenting); *see Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n. 1, 109 S.Ct. 2363, 2371 n. 1, 105 L.Ed.2d 132 (1989) (pointing out the "danger of placing undue reliance on the concept of congressional 'ratification' "). If acquiescence by silence can ever carry the day, it can do so only in areas such as the tax law where Congress exercises vigorous oversight or amends the statute frequently. Neither is the case here. Congress has amended the MDL statute only once in almost thirty

years [18] and there is no indication that any of its committees exercises oversight in this area.[19] To the contrary, this is an area where Congress relies on the judiciary to point out problems and propose solutions, as it did when section 1407 was first passed.

The MDL statute, it will be recalled, was the brainchild of the federal judiciary: The Coordinating Committee for Multiple Litigation in the U.S. District Courts, established by the Judicial Conference of the United States, brought the problem to the attention of Congress, wrote the statute, lobbied for its adoption and explained to Congress exactly how it would work. *See* H.R. 1130, *in* 1968 U.S.C.C.A.N. at 1899. The Coordinating Committee eschewed the possibility of trial in the transferee court,[20]

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[18] In 1976, Congress added section 1407(h) to provide for consolidation of cases filed under a newly added section 4C of the Clayton Act. *See* Pub.L. No. 94-435, tit. III, § 303, 1976 U.S.C.C.A.N. (90 Stat. 1383, 1396.

[19] Congressional silence in the face of the self-transfer practice is especially problematic considering how inconspicuous the practice is. First, there are no accurate statistics on how many cases are subjected to self-transfer; neither the JPML nor the Administrative Office of the United States Courts nor the Federal Judicial Center keeps track. All we know is that lots of cases are subjected to the MDL process and very few ever get remanded. Second, the MDL statute continues to be portrayed as a mechanism affecting only pretrial, not trial, making "MDL appear to do less than it does." Judith Resnik, *From "Cases" to "Litigation"*, 54 Law & Contemp. Probs. 5, 47 (Summer 1991).

[20] The Committee stated that "[t]he major innovation proposed is transfer solely for pre-trial purposes," which would achieve efficiency "without losing the benefits of local trials." *Report of the Co-Ordinating Committee on Multiple Litigation Recommending New Section 1407, Title 28* (Mar. 2, 1965), *reprinted in In re Plumbing Fixture Cases*, 298 F.Supp. 484, 498, 499 (J.P.M.L.1968). As a result of the increased efficiency during pretrial, the Committee claimed that section 1407 would actually "*maximize* the litigant's traditional privileges of selecting where, when and how to enforce his substantive rights or assert his defenses." *Id.* (emphasis added).

and never mentioned self-transfer as even a remote possibility.[21] Congress clearly understood the limited nature of the proposal and invited the federal judges to return if authorization for consolidated trials became necessary. *See id.* at 1902. The judges never bothered to return; instead, they seized the power by prescription.

* * *

Despite the complicated nature of these proceedings, the question before us is rather straight-forward: Did the district court abuse its discretion in transferring the case to itself under section 1404(a)? It clearly did because MDL courts have no authority to pass on venue transfer motions, because section 1404(a) doesn't authorize self-transfer and because the factors favoring transfer are far too weak to overcome plaintiffs' right to a trial in their home district. We must therefore vacate that order and all subsequent orders entered by the district court, including, of course, the final judgment entered after trial.[22] The case should then be in a posture where plaintiffs would finally be free to petition the MDL panel for trans-

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[21] The Coordinating Committee explained that Section 1407 "would not affect the place of trial in any case or exclude transfer under other statutes (e.g, Title 28, U.S.C. §§ 1404(a) and 1406(a)) prior to or at the conclusion of pre-trial proceedings." *Report of the Co-Ordinating Committee on Multiple Litigation Recommending New Section 1407, Title 28* (Mar. 2, 1965), 298 F.Supp. at 499. By using the phrase "prior to or at the conclusion of pre-trial proceedings," the Committee clearly indicated that a venue transfer would only be available before or after, but not while, the case was in the MDL court. *See* Comment, *Consolidation of Pretrial Proceedings*, 33 U.Chi.L.Rev. at 562.

[22] In point of fact, at the time Lexecon made its first request for remand on August 5, 1994, all coordinated and/or consolidated pretrial proceedings—to the extent there ever were any—had come to an end. All orders entered by the district court after that date were beyond its authority as they did not relate to the limited purpose for which the case was transferred under section 1407(a). *See* note 7 *supra*. These orders, particularly the summary judgment granted on April 24, 1995, should be vacated.

fer back to the Northern District of Illinois. By approving this transfer, we complete the judicial arrogation of power in this area and put the last coffin nail into the experiment Congress started in 1968 when it gave the federal courts only a limited MDL authority. I will not be one of the pallbearers. I dissent.

No. 96-1482

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

LEXECON INC., *et al.*,
Petitioners,
v.
MILBERG WEISS BERSHAD HYNES & LERACH, A PARTNERSHIP, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Whether a district court, to which a case has been transferred solely for "consolidated pretrial proceedings" under the federal multidistrict litigation statute, 28 U.S.C. § 1407(a), may transfer the case to itself for purposes of trial, notwithstanding section 1407(a)'s explicit command that every such case "shall be remanded" at the conclusion of pretrial proceedings "to the district from which it was transferred."

PARTIES TO THE PROCEEDING BELOW

The following persons or entities were parties to the proceeding in the court of appeals:

Lexecon Inc.
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Joseph Cotchett
Susan Illston

PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES

Lexecon Inc. is a privately held corporation that has no parent companies or subsidiaries that have issued shares to the public.

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 28-80) is reported at 102 F.3d 1524. The district court's opinion granting summary judgment in part is reported at 884 F. Supp. 1388; the district court's decision granting defendants' motion to dismiss in part is reported at 845 F. Supp. 1377. The district court's order staying consideration of the remand issue (CR 311[1]) is unreported, as is the court's later decision denying petitioners' request for remand and transferring this case to itself for all purposes, including trial (J.A. 20-21). The decision of the Judicial Panel on Multidistrict Litigation (J.A. 17-19)

[1] CR or "Clerk's Record" refers to the docket number of the document in the record below.

transferring this case to the District of Arizona for coordinated pretrial proceedings is also unreported.

JURISDICTION

The jurisdiction of this Court rests on 28 U.S.C. § 1254(1). The judgment of the court of appeals was entered on December 20, 1996. Lexecon Inc. and Daniel R. Fischel filed a timely petition for certiorari on March 18, 1997. This Court granted certiorari on May 19, 1997, limited to the first question presented in the petition. 65 U.S.L.W. 3766.

STATUTES INVOLVED

The federal multidistrict litigation statute, 28 U.S.C. § 1407(a), provides in pertinent part:

> When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however,* That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

The federal transfer statute, 28 U.S.C. § 1404(a), provides in relevant part:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

STATEMENT OF THE CASE

This case presents a straightforward issue of statutory interpretation.

The federal multidistrict litigation statute authorizes the Judicial Panel on Multidistrict Litigation ("JPML" or "panel") to transfer cases only "for coordinated or consolidated pretrial proceedings." 28 U.S.C. § 1407(a). The statute further provides that "[e]ach action so transferred *shall be remanded* by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated." *Id.* (emphasis added).

Despite this plain statutory command, a divided panel of the Ninth Circuit ruled that an action transferred under section 1407(a) need *not* be remanded at or before the conclusion of consolidated pretrial proceedings. Instead, the majority concluded, a transferee court may use the general federal transfer statute—which authorizes transfer only "to any *other* district or division where it might have been brought" (28 U.S.C. § 1404(a) (emphasis added)) —to override the mandate of section 1407(a) and to "transfer" a case to *itself* for all purposes, including trial.

A. Background and Prior Proceedings.

The Parties' Dispute. Lexecon is one of the nation's leading law and economics consulting firms. Daniel Fischel is a principal of Lexecon and the Lee and Brena Freeman Professor of Law and Business at the University of Chicago Law School. Professor Fischel frequently testifies as an expert in complex class action securities cases.

The respondents—two law firms (Milberg Weiss Bershad Hynes & Lerach ("Milberg") and Cotchett, Illston & Pitre ("Cotchett")) and certain individual members of those firms—are plaintiffs' class action lawyers. They have, in recent years, brought numerous, highly-publicized class action securities lawsuits. Professor Fischel provided what was characterized by the Wall

Street Journal and other commentators as decisive testimony for the defense in a number of those suits, thereby costing the respondent law firms millions of dollars in contingency fees.

Angered by this succession of costly losses, respondents engaged in a wide-ranging effort to ruin Lexecon's reputation and, as one of the respondents put it, to "destroy" Professor Fischel. CR 127, Amended Complaint ¶¶ 1-6. The first step in respondents' scheme was to name Lexecon as a defendant in *Shields v. Keating*, a case heard in the District of Arizona as part of MDL No. 834, *American Continental Corporation/Lincoln Savings & Loan Litigation*. Respondents, who were class counsel in that case, knew that Lexecon had engaged in no wrongdoing, but nevertheless falsely accused Lexecon of complicity with Charles Keating in one of the most notorious financial scandals of this century. Respondents repeatedly acknowledged, even boasted, to third parties that the suit against Lexecon was without merit, but was being pursued as a vendetta against Lexecon and Professor Fischel. CR 127, Amended Complaint ¶¶ 39, 63, 67.

Respondents then used their *Lincoln Savings* complaint against Lexecon in courtrooms around the country, in the press, and with Lexecon's clients and business associates to portray Professor Fischel as a "crook" and a "racketeer" and Lexecon as a firm whose expert credentials could no longer be trusted. CR 127, Amended Complaint ¶¶ 36-37, 46, 56-57, 93-98. In furtherance of their scheme, respondents knowingly used fabricated evidence, attempted to extort perjured testimony, defrauded the courts, and engaged in wholesale document destruction. *See, e.g.*, CR 127, Amended Complaint ¶¶ 43, 69-73, 110.

Lexecon was dismissed from the *Lincoln Savings* case in August 1992. As a result of respondents' misconduct, however, Lexecon lost millions of dollars in fees, and both petitioners suffered significant damage to their reputations. CR 127, Amended Complaint ¶¶ 46-48, 50-55, 103, 117.

The Filing of this Action and Pretrial Proceedings in Chicago. On November 25, 1992, Lexecon and Professor Fischel (hereinafter jointly "Lexecon") filed the instant action in the United States District Court for the Northern District of Illinois, Lexecon's principal place of business and a forum in which many of the alleged wrongful acts occurred. Lexecon sought damages for respondents' malicious prosecution of the *Lincoln Savings* case, abuse of process, tortious interference with petitioners' existing and prospective client relationships, defamation, and commercial disparagement. The case was assigned to Judge James B. Zagel.

After Lexecon filed its complaint in Chicago, Judge Richard M. Bilby, who had presided over the earlier *Lincoln Savings* case in Arizona, somehow obtained a copy and read it. On December 31, 1992, Judge Bilby—although he had no live dispute involving Lexecon before him at the time—*sua sponte* issued an "order" purporting to "clarify" the basis on which Lexecon had been dismissed from the *Lincoln Savings* case. *See* J.A. 33 n.2. In his order, Judge Bilby expressed his view that, contrary to the allegations in Lexecon's complaint and what Judge Bilby himself said at the time he dismissed Lexecon as a "non-settling defendant," the *Lincoln Savings* litigation had not terminated favorably to Lexecon.[2] Judge Bilby proceeded to recount his own understanding of various off-the-record events relating to the dismissal in order, he explained, to give "the judge in Chicago . . . something to rely on." Milberg 9th Cir. Excerpts of Record at 441. Judge Bilby recognized that his recollection of these events made him a potential witness in the Lexecon case in Chicago, but stated, "that ain't going to happen." *Id.* at 437.

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[2] Under Arizona law, favorable termination is a necessary element of a malicious prosecution claim. Accordingly, in its complaint, Lexecon detailed the circumstances leading up to its dismissal from the *Lincoln Savings* suit and explained why those circumstances demonstrated that the suit terminated favorably to Lexecon.

Respondents argued to Judge Zagel that Judge Bilby's order was somehow "preclusive," and that Judge Zagel should stay all proceedings in Chicago. CR 23, at 10. But Judge Zagel indicated that he did not agree with that analysis. Judge Zagel noted that if Judge Bilby had relevant factual knowledge concerning the events, he could be a witness, but that, even if "Judge Bilby's order was written in stone and can never be erased, its effect here based on the law as I currently understand it is likely not to be preclusive." *Id.* In subsequent rulings, Judge Zagel rejected defendants' challenges to the court's jurisdiction, compelled discovery over defendants' objections, and indicated his disagreement with respondents' argument that the Arizona tort of malicious prosecution was unconstitutional. *See* CR 107, at 3, 10; CR 120, at 64-67.

The Transfer of the Case to Arizona. Seeking to avoid Judge Zagel's unfavorable rulings, respondents filed a motion with the JPML pursuant to 28 U.S.C. § 1407 to transfer this case to Judge Bilby and to consolidate it with the *Lincoln Savings* litigation. Before the JPML could rule on defendants' motion, however, Judge Bilby sent a letter to the JPML recusing himself because his "involvement" in the resolution of the underlying case would make it "improper" for him to act as a judge in this case. CR 149, Exh. A, at 1.

Notwithstanding Judge Bilby's recusal, respondents renewed their motion to transfer, asking the JPML to send this case to any other judge in Arizona. Lexecon objected to that motion because none of the other Arizona judges had any experience with the *Lincoln Savings* litigation. Moreover, the few remaining *Lincoln Savings* cases did not involve common questions of fact and either had already been tried or had settlements pending approval, making coordinated *pretrial* proceedings impossible. There was no reason to believe, therefore, that a transfer would "promote the just and efficient conduct of such actions" through "coordinated or consolidated pretrial proceedings." *See* 28 U.S.C. § 1407(a).

In spite of these objections, in June 1993 the JPML granted respondents' motion to transfer. In the panel's view, transfer was appropriate because: (1) there was an extensive "document depository" in Arizona; (2) there might be some opportunity for coordination with an unfinished settlement involving one of the *Lincoln Savings* defendants; and (3) the Ninth Circuit was hearing an appeal that "m[ight] be relevant to the *Lexecon* claims." J.A. 18-19.

Proceedings in Arizona. Following the transfer, the case was assigned to Judge John M. Roll, who had no prior familiarity with this matter or with any of the *Lincoln Savings* cases. No coordinated or consolidated pretrial proceedings of the sort envisioned by the JPML ever ensued. The "document depository" was never used, and was in fact shut down in July 1993; there was no coordination with the unfinished *Lincoln Savings* settlement, pending before a different judge, which was completed in February 1994; and the Ninth Circuit appeal that the JPML thought "m[ight] be relevant" was dismissed in June 1993.

Nor were there any identifiable efficiencies in the pretrial process: there were no joint depositions and no coordinated document production. The documents produced in discovery—more than a million pages—were all kept in Illinois, and only one of the 42 deponents and potential deponents identified by the parties resided in Arizona. Indeed, once they got the case transferred out of Chicago, respondents did not even propose any coordinated or consolidated pretrial proceedings. The net effect of the transfer, therefore, was to supplant the judge in petitioners' home district who had spent six months working on the case with a new judge thousands of miles away who knew nothing of the matter and had to start from scratch.

By August 1994, the case had been pending in Arizona for more than a year without any coordinated or consolidated pretrial proceedings. Moreover, as noted, the three

factors identified by the JPML as supporting the transfer no longer existed. Accordingly, on August 5, 1994, petitioners moved—pursuant to the procedures specified by the JPML (*see* JPML Rule 14(d))—for the district court to refer the case back to the JPML for remand to the Northern District of Illinois. *See* CR 288. Respondents opposed the suggestion of remand, not because any consolidated or coordinated pretrial proceedings were planned, but rather because merits discovery had not yet been completed *in this case*. Judge Roll deferred decision on the remand issue until the end of discovery. CR 311, at 1. But he offered no justification for continuing to hold onto the case notwithstanding section 1407(a)'s requirement that all such cases "shall be remanded" at or before the conclusion of coordinated pretrial proceedings.

When discovery ended in November 1994, petitioners again asked Judge Roll to comply with the statute and return the case to the JPML for remand to Illinois. Respondents objected to the request, and at this point urged the court to transfer the case to itself for all purposes pursuant to 28 U.S.C. § 1404(a).

Judge Roll once more declined to rule on the motion for remand, or to offer any justification for keeping the case after there was no longer even a pretense of coordinated pretrial proceedings. Instead, he proceeded to make dispositive rulings on virtually all of petitioners' claims. For example, on December 15, 1994, having previously accepted respondents' argument that the Arizona common law tort of malicious prosecution was unconstitutional (the precise argument rejected by Judge Zagel), Judge Roll denied with prejudice petitioners' motion for leave to amend their complaint to comport with his ruling. CR 481, at 1. And, on April 24, 1995, Judge Roll granted summary judgment in favor of respondents on all remaining claims, except for one aspect of Lexecon's defamation claim. *See* 884 F. Supp. at 1397.

On May 5, 1995, the Arizona district court denied petitioners' motion to remand and simultaneously granted

respondents' request that it transfer the case permanently to itself. J.A. 20-21. Without mentioning the language of Section 1407, the court stated that there was "[s]ubstantial authority" establishing that section 1407 does not require a case to return to its original district after coordinated pretrial proceedings are complete. J.A. 20. The court further concluded, again without mention of the relevant statutory language, that 28 U.S.C. § 1404 gave it the "power to transfer this action to itself." *Id.*

Lexecon's Petition for Mandamus. Lexecon believed that the district court's order denying remand and transferring the case to itself violated sections 1404 and 1407 and subjected the company to potentially irreparable harm —forcing it to go to trial in a forum thousands of miles from home where "there was much popular feeling" against entities that, like Lexecon, were alleged to have been involved in the Charles Keating/Lincoln Savings scandal. J.A. 74 (Kozinski, J., dissenting). Lexecon thus petitioned the Ninth Circuit for a writ of mandamus.

The Ninth Circuit held oral argument on the mandamus petition, but eventually determined that extraordinary relief was not warranted. J.A. 23-25. The two-judge majority acknowledged that the text of section 1407 provided an apparently "clear statutory mandate" and that the court "might well" decide on direct review that the district court's transfer decision was unlawful. J.A. 24, 25. Ultimately, however, the majority accepted respondents' argument that mandamus was unnecessary because Lexecon could seek review of the denial of remand and the self-transfer on direct appeal following a final judgment. J.A. 23.

Judge Kozinski dissented. He would have issued the writ to correct the district court's "egregious" error in "disregard[ing] the statutory mandate" of sections 1404 and 1407. J.A. 25, 25-26 (Kozinski, J., dissenting). In Judge Kozinski's view, it was "hard to imagine a clearer statutory

command" than that contained in section 1407, and mandamus should be granted to "say[] loud and clear that the Multidistrict Panel assigns cases only for pretrial proceedings." J.A. 25, 26 (Kozinski, J., dissenting). "When it comes to conducting a trial (and resolving other dispositive matters)," Judge Kozinski stressed, "plaintiffs retain their ancient right to select the forum." J.A. 27 (Kozinski, J., dissenting).

Trial. Trial on the remaining defamation issue—which was governed by Illinois law—then went forward in the District of Arizona. The Milberg respondents prevailed in a jury trial, and the district court entered final judgment. CR 681, 684.[8]

B. The Decision Below.

On appeal, a different and sharply divided panel of the Ninth Circuit affirmed the district court's transfer rulings in all respects. Judge Kozinski was the only member of this panel who had also ruled on the mandamus petition.

The majority, relying on "longstanding practice and the efficiency arguments" (J.A. 40), found no flaw in the district court's refusal to remand and its decision to transfer this case to itself. Such transfers, the majority stated, are authorized by the JPML's rules and by a series of court of appeals and district court decisions. J.A. 39 & n.3 (collecting cases). The majority further concluded that, in multidistrict litigation, the judicial interest in "efficien[t]" disposition of cases "trump[s]" the "usual deference to a plaintiff's choice of forum." J.A. 40 & n.5. Finally, the majority suggested that section 1407 is concerned only with the powers of the JPML and thus does not disturb

[8] Shortly before trial, on June 7, 1995, the district court entered a final judgment in favor of the Cotchett Respondents, who were not implicated in the defamation count. CR 602. Lexecon filed a timely appeal from that judgment, and that appeal was consolidated with Lexecon's later appeal from the final judgment for the Milberg respondents.

the "traditional powers of the district court to which a case has been transferred." J.A. 41.

Judge Kozinski again dissented. Expanding on his earlier opinion, he stressed that self-transfer conflicts with the plain language of section 1407 and with Congress's explicit refusal to authorize multidistrict transferee courts to conduct trials. J.A. 57-58 (Kozinski, J., dissenting). Nor could self-transfer be justified by reference to section 1404(a), whose text states "in plain and simple terms" that a case may be transferred only to " 'any *other* district or division where it might have been brought.' " J.A. 68-69 (Kozinski, J., dissenting) (quoting section 1404(a)). This language, Judge Kozinski explained, cannot be read "to authorize a district court to transfer a case to itself." J.A. 69 (Kozinski, J., dissenting). Accordingly, Judge Kozinski would have reversed the judgment below and vacated all the district court's rulings issued after August 1994, when Lexecon first sought a remand and it was clear that "all coordinated and/or consolidated pretrial proceedings—to the extent there ever were any—had come to an end." J.A. 79 n.22 (Kozinski, J., dissenting).

SUMMARY OF ARGUMENT

The lower federal courts have illegitimately converted the multidistrict litigation statute into a mechanism for shuttling entire cases off to far-flung districts for trial in forums that plaintiffs would never have chosen. As Judge Kozinski explained, Congress intended the multidistrict litigation statute to preserve plaintiffs' choice of forum, while "tak[ing] advantage of consolidated or coordinated discovery with other cases having a common factual nucleus." J.A. 57 (Kozinski, J., dissenting). Since the law was enacted, however, federal judges have "develop[ed] proprietary feelings toward the cases entrusted to them" and have "routine[ly]" refused to relinquish them at the end of consolidated pretrial proceedings. J.A. 58 (Kozinski, J., dissenting). Thus, in multidistrict litigation, plaintiff's choice of forum—which, under traditional principles,

"should rarely be disturbed" (*Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947))—has "devolved to the significance of a tailbone or an appendix." J.A. 71 (Kozinski, J., dissenting).

This practice of "self-transfer" cannot be reconciled with the language of either section 1407 or section 1404. It is directly contrary to all evidence of congressional intent and to the historical right of plaintiffs to choose their forum for trial. And it has been criticized as a usurpation of legislative authority by a host of scholarly commentators—including Professor Charles Alan Wright, who has filed a brief in this Court supporting petitioners.

A. Congress has said in language "clear as sunlight" (J.A. 57 (Kozinski, J., dissenting)) that multidistrict transfers are only for "coordinated or consolidated pretrial proceedings." No later than the conclusion of such proceedings, these cases "shall be remanded" to the original districts from which they were transferred. 28 U.S.C. § 1407(a).

Accordingly, a transferee court has no authority to retain a case after its congressionally-granted power to oversee coordinated pretrial proceedings has expired. At that point, the statute's plain terms require that the case be returned to the district court originally chosen by the plaintiff. The practice of "self-transfer," endorsed by the Ninth Circuit here, defies this unambiguous statutory command and is thus unlawful.

The general federal transfer statute, 28 U.S.C. § 1404(a), provides no basis for circumventing the mandate of section 1407(a). The transferee court's entire authority over the case derives from section 1407(a) and is therefore circumscribed by its terms. The transferee court may not, in the exercise of a limited power to conduct coordinated pretrial proceedings, claim permanent jurisdiction over the entire case. Indeed, the recognition of such a power would render section 1407's express requirement that cases "shall be remanded" at the conclusion of consolidated pretrial proceedings utterly meaningless. Under such a theory, remand would not be mandatory at all, but, rather, would be entirely within the discretion of the transferee court. That result cannot be squared with the plain text of section 1407.

Furthermore, section 1404(a) itself states—again in remarkably direct language—that a court may transfer a case only to some *"other* district," not to itself. There is simply no reasonable way to infer from the plain English of that provision that Congress intended to permit self-transfer.

B. The legislative history of section 1407(a) confirms what its language so plainly states. Congress understood that it was authorizing transfers solely to ease pretrial burdens; at or before the conclusion of coordinated pretrial proceedings, the case must return to the forum where the plaintiff chose to file suit.

Indeed, the federal judicial report that provided the basis for the new legislation offered express assurances that the proposed statute would not disturb the plaintiff's choice of forum for trial. And the House Report accompanying the legislation confirmed that section 1407(a) was not to "affect the place of trial in any case"; subsequent "amendments" to the statutory language would be necessary to permit multidistrict transfers for all purposes.

C. The clear meaning of the federal statute, reinforced by unequivocal legislative history, cannot properly be ignored on the strength of past practice or judicial judgments as to wise policy. Congress established the relevant policy —a balance of efficiency and respect for plaintiffs' historical right to choose their forum—in the text of section 1407(a). And, as the Court recently made abundantly clear in *Amchem Products, Inc. v. Windsor*, No. 96-270 (U.S. June 25, 1997), the judiciary may not alter that balance, no matter how deeply entrenched its practices nor

how strong its beliefs as to the advisability of an alternative scheme.

In any event, the Ninth Circuit's policy analysis is misguided. Permitting self-transfer encourages forum-shopping under the guise of limited multidistrict transfers, is unnecessary to achieve efficient results in appropriate cases, and will often (as here) lead to grossly inefficient transfers that would never have been justified under the standards of section 1404.

ARGUMENT

THE MULTIDISTRICT LITIGATION STATUTE AUTHORIZES TRANSFERS ONLY FOR "COORDINATED OR CONSOLIDATED PRETRIAL PROCEEDINGS" AND REQUIRES THAT A CASE BE REMANDED TO THE PLAINTIFF'S CHOSEN FORUM AT OR BEFORE THE CLOSE OF THOSE PROCEEDINGS.

A. The Plain Language of the Multidistrict Litigation Statute Requires Remand When Consolidated Pretrial Proceedings Are Complete.

1. The most fundamental of all rules of statutory interpretation is that courts must adhere to the plain language—the "ordinary English"—of the laws that Congress has enacted. *Barnett Bank of Marion County, N.A. v. Nelson*, 116 S. Ct. 1103, 1111 (1996). Indeed, no principle is more central to this Court's jurisprudence than that "courts must give effect to the clear meaning of statutes as written." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992). As this Court recently admonished: " 'Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed, which would justify a court in departing from the plain meaning of words . . . in search of an intention which the words themselves did not suggest.' " *United States v. Gonzales*, 117 S. Ct. 1032, 1036 (1997) (quoting *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95-96 (1820) (Marshall, C.J.)).

This bedrock rule of adjudication is dispositive here. The language of section 1407(a) is clear. The statute authorizes transfers only for "coordinated or consolidated pretrial proceedings." 47 U.S.C. § 1407(a). If a case has not been concluded by the time such consolidated proceedings are complete, it *must* be returned to the district where the case was initially filed: "Each action so transferred *shall be remanded* by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated." *Id.* (emphasis added).

One does not "have to stare very long at that statutory language" to divine its meaning. J.A. 57 (Kozinski, J., dissenting). Congress granted multidistrict transferee courts only the carefully circumscribed authority to preside over consolidated pretrial proceedings, and a case transferred under section 1407(a) must be returned to the plaintiff's chosen forum at or before the time when such proceedings are over—unless the case has been "terminated" during consolidated proceedings.

In contrast, when Congress wanted to permit transfer for all purposes, including trial, it did so expressly. *See* 28 U.S.C. § 1407(h) ("the judicial panel on multidistrict litigation may consolidate and transfer with or without the consent of the parties, *for both pretrial purposes and for trial*, any action brought under section 4C of the Clayton Act") (emphasis added). Here, Congress unequivocally required a remand no later than the conclusion of coordinated pretrial proceedings. As Professor Wright has explained, the "explicit" and "mandatory" language of section 1407(a) "leaves no room for the transferee court or the [JPML] to exercise discretion whether to remand the case." Brief of Charles Alan Wright as *Amicus Curiae*

Supporting Petitioner 3-4 (Apr. 11, 1997) (filed in support of Lexecon's petition for a writ of certiorari).[4]

2. Although the Ninth Circuit's decision on this issue was grounded largely in the majority's policy preferences —a mode of statutory analysis that we address below— the court did make some attempt to address the language of section 1407(a) and to wring a different meaning out of its text. In particular, the court of appeals suggested that the duty to remand cases applies only to the JPML, not the transferee court. On this theory, a transferee court is free to transfer a case to itself for all purposes pursuant to 28 U.S.C. § 1404(a) without regard to the JPML's express duty under section 1407(a) to remand the case back to the original district before trial. *See* J.A. 41-42. This argument is fatally flawed in at least three respects.

First, in ruling on a motion to remand, the transferee court exercises authority *delegated* by the JPML itself. *See* JPML Rule 14(d). In executing that delegated authority, the district court has no more discretion to refuse to remand a case at the end of coordinated pretrial proceedings than the JPML itself would have if it were to handle such a request itself in the first instance. The

[4] Even respondent Milberg has recognized the force of this language. In a brief filed in May of this year, as counsel in another proceeding, Milberg declared unequivocally that the language of section 1407 "*mandates* that a transferee court remand a transferred action for trial once consolidated pretrial proceedings are complete and its authority under section 1407(a) has thus ended." Class Plaintiffs' Memorandum in Opposition to the Motion to Transfer the Trial of the Kayne Action to the Eastern District of New York, *In re MTC Elec. Technologies Shareholder Litig.*, No. CV-94-1763 (JG) (E.D.N.Y. May 2, 1997), at 3 (emphasis added). Milberg further explained that any attempt to retain a case after such proceedings were complete would "ignore[] the plain mandate of 28 U.S.C. § 1407(a)." *Id.* For the convenience of the Court, Lexecon has lodged copies of this document with the Clerk's office.

JPML cannot alter or broaden its authority by delegating it.[5]

Congress provided only one exception to the JPML's mandatory duty to remand the case at the end of consolidated proceedings: where the case has been "terminated" during pretrial proceedings. 28 U.S.C. § 1407(a). The Ninth Circuit's interpretation would create a second exception that appears nowhere in the statute and that would swallow the rule. Under the court of appeals' reading, Congress's unequivocal command that a case "shall be remanded" would be transformed into a meaningless suggestion that the case "shall be remanded unless the transferee court decides it should not be." But courts have no power to add exceptions to the ones that Congress has expressly provided. *CPSC v. GTE Sylvania, Inc.*, 447 U.S. 102, 109 (1980); *Continental Casualty Co. v. United States*, 314 U.S. 527, 533 (1942). Much less may they imply an exception that would render a specific and mandatory duty meaningless. *See Walters v. Metropolitan Educ. Enterprises, Inc.*, 117 S. Ct. 660, 664 (1997) ("Statutes must be interpreted, if possible, to give each word some operative effect"); *Lane v. Peña*, 116 S. Ct. 2092, 2100 (1996) (no statutory provision should be understood to be superfluous).

Second, the plain language of section 1407 *does* specifically limit the transferee court's own authority over a case.

[5] For this reason, it is bizarre for the Ninth Circuit to suggest (J.A. 43) that Lexecon should have sought relief directly from the JPML and that its failure to do so somehow left the district court with no choice but to transfer the case to itself "to avoid the absurdity of indefinitely suspended litigation, the pretrial proceedings of which have come to a close." Under the JPML's rules, the proper practice was for Lexecon to bring its section 1407 argument to the transferee district court, and not the JPML, in the first instance. *See* JPML Rule 14(d). That makes sense since it is the transferee court that will know when consolidated pretrial proceedings have ended. In carrying out that delegated responsibility, however, the district court must adhere to the same statutory limitations as the JPML in deciding the remand issue.

Section 1407 "authoriz[es] transfers *only* for pretrial purposes." *See In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1174 (D.C. Cir. 1987) (R.B. Ginsburg, J.) (emphasis added), *aff'd on other grounds sub nom. Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989). Section 1407(a) provides:

> When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district *for coordinated or consolidated pretrial proceedings*.

28 U.S.C. § 1407(a) (emphasis added). Similarly, section 1407(b) explains:

> *Such coordinated or consolidated pretrial proceedings* shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation.

28 U.S.C. § 1407(b) (emphasis added).

A transferee court has no authority to expand its powers beyond what Congress has granted it under the express terms of the statute, and the statute makes clear that the transferee court's authority is limited to the conduct of coordinated pretrial proceedings. Accordingly, a transferee court has no proper alternative but to relinquish a multidistrict case at the end of such consolidated pretrial proceedings. *See generally Finley v. United States*, 490 U.S. 545, 547 (1989) (" 'courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction' ") (quoting *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75, 93 (1807) (Marshall, C.J.)).

Indeed, if the Ninth Circuit were correct, the specific legislative compromise that is at the heart of section 1407 would be completely undone. The text of section 1407 makes plain that Congress was willing to allow plaintiffs to be sent to far-off—and potentially very inconvenient—forums, but only for the limited duration of coordinated

pretrial proceedings. At the end of those proceedings, plaintiffs are guaranteed that their cases will be returned to the forum they originally selected. Under the Ninth Circuit's interpretation, that carefully crafted legislative compromise, embodied in the unambiguous text of section 1407, is entirely defeated. A transferee court could use the general federal transfer statute to do exactly what Congress prohibited in section 1407: convert its circumscribed authority to supervise *only* consolidated pretrial proceedings into a boundless license to preside over the entire case. It is well-established, however, that courts cannot construe general statutory provisions in a way that would negate more specific ones. *See Crawford Fitting Co. v. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) ("a specific statute will not be controlled or nullified by a general one"); *Morales v. TWA*, 504 U.S. 374, 384 (1992) ("it is a commonplace of statutory construction that the specific governs the general").

Third, and finally, even if section 1407 could somehow be construed to allow transferee courts to entertain section 1404(a) transfer motions, the Ninth Circuit's approval of "*self*-transfer" would still crash head-on into the language of section 1404(a).

Section 1404(a) states that "[f]or the convenience of parties and witnesses, in the interest of justice, *a district court* may transfer any civil action *to any other district or division* where it might have been brought" (emphasis added). The only linguistically reasonable interpretation of that language is that the "other district court" that may receive the case stands in contrast to the "district court" that "may transfer" it. *See* J.A. 68-69 & n.9 (Kozinski, J., dissenting). Section 1404(a), accordingly, contemplates transfers to any district where venue would be proper "*other*" than the one where the case is pending. It provides no authority for a court to transfer a case to itself.

It is no answer to suggest that, in ruling on a transfer motion, the transferee court somehow "stands in the shoes"

of the transferor court, thus making the transferee court itself an "other" court for purposes of section 1404. This "Rube Goldberg argument" (J.A. 69 n.9 (Kozinski, J., dissenting)) finds no support in the text of section 1407. Nothing in that section suggests that a transferee court is merely a surrogate for the transferor court when it is presiding over consolidated pretrial proceedings. Indeed, for section 1404 to authorize self-transfer under this theory, one would have to imagine that the transferee court *becomes* the transferor court for the purposes of effectuating the transfer, and then—somewhere between the subject and object of the sentence—suddenly transforms itself back into the transferee court for the purpose of being the "other" district court that may accept the transfer. The language of section 1404(a) provides no support for such a metaphysically challenging transformation. And surely nothing in that provision suggests that Congress intended such metaphysics to override section 1407's unequivocal remand requirement.

Indeed, the drafters of section 1404(a) could not possibly have meant to authorize self-transfers. Section 1404(a) long predates section 1407. Thus "the possibility that a district court would be in a position to transfer a case to itself was not something anyone at the time could [even] have anticipated," much less intended to authorize. J.A. 69 (Kozinski, J., dissenting). In the words of Professor Wright, "[a] 1948 statute cannot be given a meaning it could not have had when it was adopted in order to provide a result under a 1968 statute that Congress specifically considered and expressly rejected." *Amicus* Br. of Charles Alan Wright at 6.[6]

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[6] An additional reason for not reading section 1404(a) as an expansion of section 1407(a) is that the standards for an all-purpose section 1404(a) transfer are different from those for a limited section 1407(a) transfer. Although both provisions allow transfers "for the convenience of parties and witnesses," only section 1407(a) allows transfers to "promote the just and efficient conduct" of cases. The lower courts, like the Ninth Circuit here, generally rely on judicial efficiency to justify using section 1404(a) to evade section 1407(a)'s remand requirement. But section 1404(a), unlike section 1407(a), does not recognize judicial efficiency as a basis for a transfer. It is therefore a perversion of congressional intent to use the former to expand the latter.

B. The Legislative History Confirms That Multidistrict Transferee Courts May Only Conduct Consolidated Pretrial Proceedings.

For the reasons we have discussed, the language of section 1407(a) is clear and dispositive. No further inquiry is required. *See Estate of Cowart*, 505 U.S. at 475 ("when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished"). If, however, one looks beyond the plain text of section 1407 to its drafting history, that inquiry only reinforces the plain terms of the statute. As Professor Wright explains, "[t]he legislative history is unambiguous. Congress knew that it was authorizing transfer for pretrial proceedings only and that when those proceedings were ended, the action was to be remanded to the transferor court." *Amicus* Br. of Charles Alan Wright at 4.

Section 1407 had its genesis in a federal judicial report by the Co-Ordinating Committee on Multiple Litigation. The Committee's Report emphasized that the proposed statute was designed to address "the additional litigation costs which are engendered in multi-district litigation through overlapping and conflicting discovery," and thus would affect "only the pre-trial stages in multi-district litigation." *In re Plumbing Fixture Cases*, 298 F. Supp. 484, 499 (J.P.M.L. 1968) (reprinting Committee Report). The Report stated unequivocally that the proposed legislation "would not affect the place of trial in any case" and, accordingly, that "[t]he major innovation proposed is transfer solely for pre-trial purposes," which would achieve "efficien[cy] and econom[y] . . . without losing the benefits of local trials in the appropriate districts." *Id.* The

Committee stressed that these limitations on the scope of multidistrict transfers would "maximize the litigant's traditional privileges of selecting where, when, and how to enforce his substantive rights or assert his defenses while minimizing possible undue complexity from multiparty trials." *Id.*

Senator Tydings, the primary Senate sponsor of the bill, evinced the same understanding of the proposal's limited scope. "[F]or purposes of this legislation," he emphasized, "we are not talking about the jury trial—we are talking about the pretrial proceedings, the depositions and discoveries. And under this bill, when . . . deposition and discovery is completed, then the original litigation is remanded to the transferor district for trial." *Multidistrict Litigation: Hearings on S. 3815 and S. 159 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, Part II, 90th Cong., 1st Sess. 109-10 (1967).

The same intent to authorize only limited multidistrict transfers is evident in the House Report accompanying the bill that became section 1407. The Report states unequivocally that the proposed legislation "would not affect the place of trial in any case." H.R. Rep. No. 90-1130 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1898, 1900. As the Report explained:

> The subsection requires that transferred cases be remanded to the originating district at the close of coordinated pretrial proceedings. The bill does not, therefore, include the trial of cases in the consolidated proceedings.

1968 U.S.C.C.A.N. at 1901.

The House Report gives three reasons for restricting transfers to coordinated pretrial proceedings. First, "[t]he experience of the Coordinating Committee [on Multiple Litigation] was limited to pretrial matters and the committee considers it desirable to keep this legislative proposal within the confines of that experience." Second, "trial in the originating district is generally preferable from the standpoint of the parties and the witnesses, and from the standpoint of the courts it may be impracticable to have all cases in mass litigation tried in one district." Finally, "the committee recognizes that in most cases there will be a need for local discovery proceedings to supplement coordinated discovery proceedings." *Id.* at 1901-02. *Accord* S. Rep. No. 90-454, at 5 (1967) (emphasizing the same points in nearly identical language).

The House Report, moreover, expressly noted that if "future experience" were to demonstrate that "consolidation and coordination for trial purposes" was desirable, Congress would have to enact "amendments to the present language." 1968 U.S.C.C.A.N. at 1902. *Accord* S. Rep. No. 90-454, at 5 (similarly emphasizing that "amendments" would be necessary to allow section 1407 cases to be consolidated for trial).[7]

Congress, in short, did not understand either plaintiffs' historical prerogative to choose the forum for the litigation or the efficiency benefits of local trials to be a minor

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[7] The Ninth Circuit incorrectly cited the House Report in support of its conclusion that Congress contemplated the use of self-transfer. J.A. 41-42. The court's analysis, however, rests on highly selective quotations from passages in which Congress noted that the statute did not do away with other mechanisms for transfer, such as section 1404(a). *Id.* As Judge Kozinski explained (J.A. 66-68 n.8), the quoted passages, when read in context, clearly refer to the possibility of transfer by the court in which the case was filed, *not* by the transferee court. Only that understanding is consistent with the House Report's repeated statements that section 1407(a) would not affect the place of trial in any case and that further statutory amendments would be necessary to allow a transferee court the authority to keep a case for trial. *See* 1968 U.S.C.C.A.N. at 1902; *see also* Report of the Co-Ordinating Committee on Multiple Litigation, 298 F. Supp. at 499 (proposed statute would not "exclude transfer under other statutes [such as 28 U.S.C. § 1404(a)] *prior to or at the conclusion of* pre-trial proceedings") (emphasis added).

concern that could be cast aside at the whim of a transferee court. Rather, these considerations were central to Congress's deliberations on section 1407 and led directly to its decision to authorize only *limited* multidistrict transfers. Section 1407 was thus the result of a considered congressional judgment that the interests of the parties and the courts would best be served by *not* permitting the transferee court to retain the case after the conclusion of consolidated pretrial proceedings. The courts have no choice but to abide by that congressional judgment.

C. The Ninth Circuit's Policy Arguments Do Not Justify a Different Result.

The Ninth Circuit favors a different balance from the one struck by Congress in section 1407. But, contrary to the Ninth Circuit's evident belief (J.A. 42), the practice of self-transfer cannot be justified by respect for longstanding practice or by efficiency concerns. This Court's decisions make clear that neither of those considerations provides any reason to ignore the clear meaning of a federal statute, buttressed in this instance by unequivocal legislative history.

Beyond this, the Ninth Circuit's policy analysis is itself misguided. Permitting self-transfer is not necessary to achieve efficient results in appropriate cases, it encourages forum-shopping, and it will often (as here) lead to transfers that could not possibly be justified under the standards of section 1404.

1. The court of appeals majority stated that a key factor in its decision was that the Arizona district court's self-transfer decision comported with "longstanding practice." J.A. 39-40 & n.3. Citing its "[r]espect for our brethren," the majority was unwilling to "accuse the JPML of violating the statute that created it" or to second-guess the many courts that had engaged in self-transfer. J.A. 41 n.7.

We do not dispute that the lower court decisions addressing this issue accord with the Ninth Circuit's conclusion.[8] Nor do we contest that the JPML Rules—which, unlike the Federal Rules of Civil Procedure, are not reviewed by this Court prior to becoming effective—codify this district court practice.[9]

Those facts, however, are beside the point. As Professor Wright has so aptly explained, the federal courts obtain their authority by Act of Congress, not by "adverse possession." *Amicus* Br. of Charles Alan Wright at 8. Past practice, therefore, is no excuse for ignoring a clear congressional command: "'Age is no antidote to clear inconsistency with a statute.'" *Metropolitan Stevedore Co. v. Rambo*, 115 S. Ct. 2144, 2149 (1995) (quoting *Brown v. Gardner*, 115 S. Ct. 552, 557 (1994)).

This Court has accordingly reversed erroneous statutory interpretations even where they were supported by precedents from *every* circuit court. *See, e.g., Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 114 S. Ct. 1439 (1994) (overturning practice upheld by

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[8] *See, e.g., Pfizer, Inc. v. Lord*, 447 F.2d 122, 124-25 (2d Cir. 1971); *In re Fine Paper Antitrust Litig.*, 685 F.2d 810, 819-20 & n.7 (3d Cir. 1982), *cert. denied*, 459 U.S. 1156 (1983); *In re Tax Refund Litig.*, 723 F. Supp. 922, 924 (E.D.N.Y. 1989); *In re The Dow Co. "Sarabond Products" Liab. Litig.*, 664 F. Supp. 1403, 1403-04 (D. Colo. 1987); *In re Caesars Palace Sec. Litig.*, 360 F. Supp. 366, 374 (S.D.N.Y. 1973); *In re Aircrash Near Duarte, Cal.*, 357 F. Supp. 1013, 1015 (C.D. Cal. 1973); *Greyhound Computer Corp. v. I.B.M. Corp.* 342 F. Supp. 1143, 1145 (D. Minn. 1972); *In re Viatron Computer Systems Corp. Litig.*, 86 F.R.D. 431, 432-33 (D. Mass. 1980); *In re Master Key Antitrust Litig.*, 70 F.R.D. 23, 28 (D. Conn. 1975); *In re Penn Central Commercial Paper Litig.*, 62 F.R.D. 341, 345 (S.D.N.Y. 1974), *aff'd sub nom. Shulman v. Goldman, Sachs & Co.*, 515 F.2d 502 (2d Cir. 1975).

[9] *See* JPML Rule 14(b) ("Each transferred action that has not been terminated in the transferee district court shall be remanded by the Panel to the transferor district for trial, unless ordered transferred by the transferee judge to the transferee or other district.").

every federal circuit); *Finley v. United States*, 490 U.S. 545 (overturning district court practice that had been approved by overwhelming consensus of lower court judges); *Brown v. Gardner, supra* (invalidating 60-year-old agency interpretation). And there is no reason at all to perpetuate such an error where, as here, the relevant court decisions reveal "a remarkable lack of critical attention to th[e] issue." J.A. 60-61 (Kozinski, J., dissenting) (noting that the Second Circuit's 1971 *Pfizer* decision "with its one page of analysis, is the only court of appeals opinion that seriously addresses the issue").

In fact, when self-transfer has been subjected to disinterested critical analysis, the practice has been widely condemned as an unlawful attempt to "do[] by judicial fiat what Congress refused to do by statute in 1969: amend section 1407 to allow transfers for trial." Roger H. Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 Cornell L. Rev. 779, 809 (1985). A host of commentators have determined that self-transfer "does not comport with the express language of section 1407 or section 1404 or with section 1407's legislative history." Ross D. Cooper, *The Korean Air Disaster: Choice of Law in Federal Multidistrict Litigation*, 57 Geo. Wash. L. Rev. 1145, 1159 (1989).[10]

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[10] Trangsrud, 70 Cornell L. Rev. at 809 ("The reasoning in these cases is demonstrably wrong."); Blake M. Rhodes, Comment, *The Judicial Panel on Multidistrict Litigation: Time for Rethinking*, 140 U. Pa. L. Rev. 711, 734 (1991) ("[A] transferee court's use of § 1404(a) sets Congress's carefully crafted plan for multidistrict litigation on its head."); Stanley J. Levy, *Complex Multidistrict Litigation and the Federal Courts*, 40 Fordham L. Rev. 41, 64 (1971) (the language and legislative history of section 1407(a) are so clear that it "originally appeared to be a futile exercise for a 1407 transferee court to rule on a 1404 transfer motion."); John F. Cooney, Comment, *The Experience of Transferee Courts Under the Multidistrict Litigation Act*, 39 U. Chi. L. Rev. 588, 606 (1972) ("[T]he apparently mandatory nature of the remand clause . . . implies that transferee courts lack this jurisdiction [to grant a section 1404 motion]."); George T. Conway III, Note, *The Consolidation of Multistate Litigation in State Courts*, 96 Yale L.J. 1099, 1102-03 (1987) ("[C]onsolidation for trial almost certainly defies both the letter of section 1407 and the intent of its drafters.") (internal footnote omitted); *Report of the America Bar Association Section of Antitrust Law Task Force to Review the Supreme Court's Decision in California v. ARC American Corp.*, 59 Antitrust L.J. 271, 302 (1990) ("The use of Section 1404(a) transfers to consolidate multidistrict cases for trial is of dubious legal validity."); Mike Roberts, *Multidistrict Litigation and the Judicial Panel, Transfer and Tag-Along Orders Prior to a Determination of Remand: Procedural and Substantive Problem or Effective Judicial Public Policy?*, 23 Mem. St. U. L. Rev. 841, 866 (1993) ("It is a leap in logic to conclude that causes of action not terminated upon dispositive motions should be retained in the transferee court under the rubric of § 1404(a), when the statutory language of § 1407 explicitly directs remand to the transferor court.").

Nor does the existence of a JPML rule permitting self-transfer transform an unlawful practice into a lawful one. Congress expressly provided that the JPML's rules must be consistent with its enabling statute and, indeed, all of federal law. *See* 28 U.S.C. § 1407(f) ("The panel may prescribe rules for the conduct of its business not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure"). *See also Johnson v. Manhattan Ry.*, 289 U.S. 479, 503 (1933) (invalidating local court rule that was inconsistent with powers granted by Congress).

JPML Rule 14(b) violates that fundamental requirement. As discussed above, section 1407 states that a transfer is only for "coordinated or consolidated pretrial proceedings" and that each case "shall be remanded" following pretrial proceedings "unless it shall have been previously terminated." 28 U.S.C. § 1407(a). The JPML rule, on the other hand, states:

> Each transferred action that has not been terminated in the transferee district court shall be remanded by the Panel to the transferor district for trial, *unless ordered transferred by the transferee judge to the transferee or other district under 28 U.S.C. § 1404(a) or 28 U.S.C. § 1406.*

JPML Rule 14(b) (emphasis added). The italicized language simply rewrites the JPML's enabling statute and

adds an excuse for failure to remand that the statute does not recognize and does not permit. The rule is therefore flatly inconsistent with section 1407's plain text and provides no basis to affirm the Ninth Circuit's determination.

2. Nor can self-transfer be justified on the theory that it "strongly promotes judicial efficiency." J.A. 42. That argument is both irrelevant and wrong.

a. The initial point is, again, an obvious one. The federal courts must adhere to the language of the statutes that Congress has enacted and cannot disregard that language no matter what their own views of wise policy may be. Indeed, this Court recently reiterated this point in the plainest possible terms. In *Amchem Products, Inc. v. Windsor*, the Court acknowledged that the kind of class action settlement approved by the trial court might well be "the most secure, fair, and efficient means of compensating victims of asbestos exposure." *Amchem*, slip op. at 35. The complete answer to that argument, however, was that "Congress . . . has not adopted such a solution." *Id.* The issue of "overriding importance," therefore, was not the judiciary's view of prudent policy, but, rather, what "Congress [has] ordered." *Id.* at 26.

Finley v. United States is to the same effect. As in *Amchem*, the *Finley* Court acknowledged that the exercise of so-called pendent-party jurisdiction over state claims resulted in "efficiency and convenience" by allowing for the consolidation of related issues in a single proceeding. 490 U.S. at 555. Nevertheless, because the plain meaning of the relevant statutes demonstrated that Congress had not granted federal courts any such authority, the Court held that they lacked the power to hear such pendent-party claims. *See id. See also Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 126 (1989) (Court is not free to pursue policy objective at expense of "unnatural" textual interpretation; "[o]ur task is to apply the text, not to improve upon it"); *Touche Ross &*

Co. v. Reddington, 442 U.S. 560, 578 (1979) ("The ultimate question is one of congressional intent, not one of whether this Court thinks it can improve upon the statutory scheme that Congress enacted into law.").

This repeatedly enunciated principle applies with full force here. Congress balanced the relevant policies when it enacted section 1407. It decided that potential cost savings justified sending plaintiffs to distant forums for purposes of coordinated discovery. Congress further concluded, however, that when such proceedings were over, competing policies dictated a mandatory remand to the plaintiff's chosen forum. *See* 1968 U.S.C.C.A.N. at 1900 (emphasizing, among other things, that "trial in the originating district is generally preferable from the standpoint of the parties and the witnesses" and that "local discovery proceedings" will generally be necessary). The judiciary is not free to strike a different balance. It may not "trump" (J.A. 40 n.5) the plain language of sections 1404 and 1407 based on its own notions of wise judicial administration.

b. In any event, even on its own terms, the Ninth Circuit's policy-based reasoning fails to support its conclusion. Contrary to the Ninth Circuit's analysis, there is no need to disregard the plain language and evident intent of section 1407 to obtain, in appropriate cases, the benefits of transfers for all purposes, including trial.

Litigants who believe that a case should proceed in a venue different from where it was first filed have a choice. They may (1) petition the JPML for a section 1407 transfer for coordinated pretrial proceedings or (2) ask the district court where the case was filed for a section 1404 transfer for all purposes, including trial.[11] Thus, in this

[11] Indeed, in appropriate cases, they may even file a section 1404 motion in the transferor court, after the case has been remanded pursuant to section 1407, seeking to return the case to the multidistrict transferee court for all purposes. *See* Report of the Co-Ordinating Committee on Multiple Litigation, 298 F. Supp. at 499.

case, if respondents were convinced that the sensible course of action was to hold the trial—not just coordinated pretrial proceedings—in Arizona, the proper course was to file a section 1404 motion with the Chicago court. They never did so, and for good reason.[12] That strategic decision, however, does nothing to diminish the evident fact that, if respondents could have satisfied well-established section 1404 standards—that transfer to Arizona accorded with "the convenience of parties and witnesses" and was "in the interest of justice"—they could have obtained precisely the benefits that the Ninth Circuit emphasized.

Indeed, this case illustrates the danger of distorting section 1407 to allow for transfers for all purposes. Armed with the knowledge that courts will "routine[ly]" (J.A. 58 (Kozinski, J., dissenting)) "self-transfer" cases once they obtain them under section 1407, respondents—who were unhappy with their trial court judge—had every incentive to seek a section 1407 transfer even though they had no genuine interest in "coordinated or consolidated pretrial proceedings." And they fought to keep the case in Arizona

[12] As Judge Kozinski explained, under normal section 1404(a) standards, a venue transfer for trial "from Chicago to Arizona would never have been granted." J.A. 72 (Kozinski, J., dissenting). Neither the parties, the witnesses, nor the lead trial attorneys resided in Arizona, and the relevant documents were being kept in Chicago. Moreover, the Arizona court, unlike the Chicago court, could not be expected to have any expertise in the Illinois common law that governed at trial. Indeed, the only reason for holding the trial in Arizona was, perversely, that Lexecon had already endured enormous cost and inconvenience in litigating in that forum. The trial court reasoned essentially that, since Lexecon had already been "dragged hundreds of miles from [its] home district" and forced to remain in that remote district even after there was no possibility of benefitting from "common proceedings" or "coordinated discovery," there was no sense in turning back at the trial stage. J.A. 27 (Kozinski, J., dissenting). While there may be some "warped logic" (*id.*) to that reasoning, the Arizona proceedings certainly could not be rationalized as necessary to promote efficient judicial administration.

even after any possibility of consolidated pretrial proceedings had vanished.

If this Court were to affirm the Ninth Circuit, the decision would lead to an onslaught of flimsy section 1407 transfer motions motivated solely by an illegitimate interest in having a different judge preside over dispositive motions and, if necessary, a trial. By contrast, a clear statement by this Court that section 1407 means what it says—that cases are transferred *only* for coordinated pretrial proceedings and must be remanded no later than the end of such proceedings—will ensure that section 1407 is not abused. Instead, motions will be filed only when litigants have a genuine interest in obtaining "coordinated or consolidated pretrial proceedings," and not when they are simply trying to obtain a section 1404 transfer by improper means.

* * * * *

In sum, Congress balanced potentially competing efficiency and policy concerns by authorizing only *limited* multidistrict transfers for consolidated pretrial proceedings, while allowing for broader transfers in those instances where the *transferor* court concludes that they are appropriate under established standards. Certainly, there are other ways of handling these complex cases, and the judiciary may well be able to devise a different system that it believes would be more beneficial. If it does, it may (as it has in the past) petition the legislature for enactment of that scheme. *See* 15 Wright, Miller & Cooper, *Federal Practice & Procedure* § 3866, at 620 (2d ed. 1986) ("If the experience in handling multidistrict litigation indicates that maximum efficiency can be obtained by allowing some cases to be transferred for consolidated trial, as well as pretrial management, then the statute should be amended to specifically so provide.").

In the meantime, however, the text of section 1407(a) requires remand at or before the time when consolidated pretrial proceedings are complete. Because the court be-

low ignored that explicit statutory requirement and thus allowed this case to be adjudicated in an unlawful venue, its judgment must be reversed. *See Olberding v. Illinois Central R.R.*, 346 U.S. 338, 340 (1953); *Schnell v. Peter Eckrich & Sons, Inc.*, 365 U.S. 260, 264 (1961); *Leroy v. Great Western United Corp.*, 443 U.S. 173, 184-85 & n.18 (1979). *See also Amicus* Br. of Charles Alan Wright at 8 ("Venue differs from subject-matter jurisdiction in that it is waivable. But absent waiver, it is as much for Congress to say in which federal court a case shall be tried as it is for it to say whether a case can be heard at all by the lower federal courts.").

CONCLUSION

The judgment of the Ninth Circuit should be reversed and the matter remanded with instructions to vacate all district court orders after the conclusion of consolidated pretrial proceedings and to return this case to the Joint Panel on Multidistrict Litigation for remand to the Northern District of Illinois.

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Supreme Court of the United States

October Term, 1996

LEXECON INC., *et al.*,

Petitioners,

v.

MILBERG WEISS BERSHAD HYNES & LERACH, A PARTNERSHIP, *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

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INTRODUCTION

Petitioners' ("Lexecon") claims against Respondents Joseph W. Cotchett, Susan Illston, and Cotchett, Illston & Pitre ("Cotchett Respondents" or "Cotchett") were all dismissed upon *pretrial* motions. The question accepted for review is whether an MDL transferee court "may transfer the case to itself for *purposes of trial.*" Pet., Question 1; Order 5/19/97 (emphasis supplied). Thus, the question accepted for review does not apply to the Cotchett Respondents. However, the relief requested by Lexecon does. Lexecon not only seeks a retrial in Illinois of the one it lost in Arizona against the Milberg Respondents ("Milberg"), but also to vacate and relitigate in Illinois an Order from which it did not appeal: the summary judgment entered in favor of Cotchett during pretrial proceedings in Arizona. It seeks to vacate all orders, proceedings, and judgments of the transferee Court from August 5, 1994 to December 12, 1995, including the summary judgment of April 24, 1995, and to re-commence and re-litigate all of those matters in the District of Illinois.

Cotchett's Motion for Summary Judgment was made eight months *before* Lexecon first moved to refer for remand. The Order granting that motion was entered *before* the Order of "permanent transfer" for trial of a claim by Lexecon against only Milberg. A separate judgment of dismissal was entered in favor of Cotchett and appealed by Lexecon *before* the trial against Milberg. The Cotchett Respondents, having previously been dismissed as parties to the case, were not parties to the trial.

There is no issue as to transfer for "purposes of trial," or trial venue, or "permanent transfer," or "self-transfer" with respect to Cotchett. This Court's decision not to accept for review Lexecon's proposed Question 2, regarding the District Court's Rule 12(b) Order of Dismissal of Lexecon's malicious prosecution and abuse of process counts, terminates Lexecon's case against the Cotchett Respondents for all purposes.

In this Separate Brief, we address the impropriety of the scope of relief Lexecon seeks to obtain in this Court. We do not address the question whether a transferee court can transfer a "case to itself for purposes of trial," since that did not occur with respect to the Cotchett Respondents. If it did, we would join in Milberg's Brief.

STATEMENT OF THE CASE

We join in the Statement of the Case contained in the Milberg Brief. The facts set forth below are those particularly material to the Cotchett Respondents.

A. The termination of the case against Cotchett during pretrial proceedings.

On November 29, 1993, the District Court in Arizona dismissed, on Rule 12(b)(6) motion, the first two counts of Lexecon's Amended Complaint: for malicious prosecution and abuse of process in the underlying Arizona *Lincoln Savings* case. *In Re ACC/Lincoln*, 845 F.Supp. 1377 (D. Ariz. 1993). Lexecon did not challenge the transferee Court's authority to dispose of those claims.

On January 14, 1994, the Cotchett Respondents filed a motion for summary judgment on all remaining counts. CR 186.[1] The Court granted Lexecon's Rule 56(f) application and allowed it approximately 10 months of additional unrestricted discovery. CR 192, 234. On August 9, 1994, after defendants' motions for summary judgment were pending for eight months, Lexecon filed a motion to refer the case back to the JPML for remand to Illinois. CR 288.

Cotchett's motion for summary judgment was argued on April 6, 1995. CR 580. On April 24, 1995, the Court granted the motion in full, dismissing all remaining claims against Cotchett. *In Re ACC/Lincoln*, 884 F.Supp. 1388 (D. Ariz. 1995).

On May 1, 1995, Cotchett lodged a separate Rule 54(b) judgment of dismissal. CR 585. Lexecon filed objections challenging only the exercise of Rule 54(b) discretion. CR 587. There was no challenge to the transferee Court's authority to enter a final judgment in favor of Cotchett. *Id.*

On May 5, 1995, the Court ruled on all venue motions. It entered the "transfer" Order that is the subject of Lexecon's Petition. The sole effect of the Order was that the single claim surviving summary judgment – a defamation claim against Milberg arising from a letter written by one of its lawyers – was to be tried in Arizona. J.A. 20.

On June 7, 1995, a separate Rule 54(b) judgment in favor of the Cotchett Respondents was entered. CR 602;

[1] "CR" refers to the record by document docket number in the District Court.

Cotchett App. 1. On July 3, 1995, Lexecon appealed from that separate judgment. Cotchett App. 2. In its Docketing Statement (Cotchett App. 3), Lexecon stated that it was appealing the merits of both the Rule 12(b)(6) and Rule 56 orders. There was no reference whatsoever to any issue pertaining to transfer for trial, or remand, or venue. The substantive appeal from the summary judgment Order was abandoned. It was not briefed by Lexecon in the Court of Appeals.

On July 25, 1995, Lexecon tried its defamation claim against Milberg and lost. Its appeal from the judgment entered in favor of Milberg was consolidated in the Court of Appeals with Lexecon's prior appeal from the judgment in favor of Cotchett.

B. Lexecon invokes, and accepts the benefits from, the transferee Court's dispositive motion jurisdiction.

On December 13, 1994, four months *after* Lexecon now contends the transferee Court lost all authority to rule on dispositive motions, it filed its own dispositive motion in that court to dismiss Milberg's counterclaims. CR 477. The motion was not filed conditionally or "without prejudice" to Lexecon's motion for remand. *Id.* Lexecon's motion to dismiss was granted in full and affirmed on appeal. Lexecon claimed and was awarded costs and accepted approximately $10,000 in credit against Milberg's costs. CR 691. Order, 11/13/95; Amended Judgment 12/12/95.

C. The Cotchett Respondents.

The Cotchett Respondents are residents of California.[2] They do not do or solicit business in Illinois. CR 310, Ex. D. The alleged acts in Illinois that Lexecon claimed gave rise to personal jurisdiction there were not committed by any of the Cotchett Respondents. *Id.*, Exs. E, F.[3]

The Cotchett firm filed one of the early Lincoln Savings cases in California which was transferred to Arizona and consolidated with the others. The firm was appointed by the Court as one of several "co-lead" class counsel. Responsibility for prosecuting the claims against over 100 separate defendants was divided among class counsel. Prosecution of the claims against Lexecon was the Milberg firm's responsibility.

Lexecon alleged below (after six months of discovery) that "Milberg Weiss" made the decision to add Lexecon as a defendant for the alleged ulterior purpose of

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[2] Cotchett, Illston & Pitre's name was changed in 1995 to Cotchett & Pitre after Respondent Susan Illston retired from the firm to become a United States District Court Judge for the Northern District of California.

[3] While Lexecon was preparing the filing of this case in Chicago, its lawyers concluded that Illinois did not have long-arm jurisdiction over Cotchett and that the lawyers would be faced with a "Rule 11 problem" if they asserted it. CR 310, Ex. C. Cotchett demonstrated in the District of Arizona that, if any claims against them were to be tried, it would be wasteful to remand to Illinois since that District lacked personal jurisdiction over them. Brief of Cotchett Appellees in Court of Appeals, 2/12/96, Pt. III(D). There was never any dispute or doubt that the District of Arizona had personal jurisdiction and proper venue over all parties, or that Lexecon could have originally filed its case there against all parties.

creating a "weapon" that "Milberg Weiss" could use to "extort unfair advantages" from Lexecon in other cases where Fischel was adverse to Milberg. CR 289, ¶¶ 36, 38. The Cotchett firm was not adverse to Lexecon in any other case. Mr. Fischel admitted in deposition that he had never even met Mr. Cotchett or Judge Illston until the trial in *Lincoln Savings*, and that he had never encountered them in any other case. CR 484, Ex. B, 308/1-309/3, 309/4-314/3.[4]

The original attorney engaged by Lexecon to prosecute this case testified that Lexecon never complained that any of the Cotchett Respondents was engaged in conduct which Lexecon claims caused it damage. CR 484, Ex. D. One of Lexecon's lawyers in *Lincoln Savings* testified that he did not know why the Cotchett Respondents were made part of this case. CR 484, Ex. F. He did not even know who they were. *Id.*

In Lexecon's first Brief in the Court of Appeals, it stated that its case was based upon "acts of Milberg Weiss" with no mention of Cotchett whatsoever. CR 484, Ex. G.

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[4] One example of how Lexecon misrepresents the record concerning Cotchett and Fischel is the statements at pages three and four of its Brief, without citation to the record, that both the Cotchett and Milberg firms have "brought numerous, highly publicized class action securities lawsuits" and that Fischel, a professional defense witness, was their nemesis. The record, as cited above, shows those allegations to be false insofar as the Cotchett firm is concerned. The real antagonists here are Lexecon and Milberg. Cotchett has been caught in the cross-fire.

D. The MDL Transfer to Arizona.

Lexecon and Fischel conduct a nationwide business providing expert testimony and consulting for defendants in securities cases. The "vast majority" (Fischel's term) of its work involves cases pending *outside* of Illinois. CR 443, Ex. A at 358/15-24. One of Lexecon's Arizona clients was Charles H. Keating, Jr. The consolidated class in *Lincoln Savings* alleged that Lexecon's reports for Keating's Lincoln Savings were false, and that Lexecon thereby aided and abetted Keating/Lincoln in defrauding regulators. Lexecon litigated that case in Arizona for over two years, and proceeded to trial in Arizona. (The Arizona transferee court transferred the case to itself for trial without objection from Defendant Lexecon).

Lexecon's false allegations pertaining to its settlement of the case in the District of Arizona were of concern to the JPML in transferring the case to Arizona because the *Lincoln Savings* settlements were still under that Court's continuing jurisdiction. CR 310, Ex. B, JPML Tr. 5/21/93, pp. 9-10.

Also of concern was that Lexecon's counsel told the Panel that the District Court in Illinois said that the District of Arizona's Order of December 31, 1992 would not be binding in Illinois. CR 310, Ex. B, *supra*, pp. 12-13 (in effect, giving Lexecon an "horizontal appeal").[5]

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[5] This Court has expressed concern about courts of one jurisdiction attempting to undermine the preclusive effect of a settlement in another jurisdiction. *See Matsushita Elec. v. Epstein*, 116 S.Ct. 873 (1996).

SUMMARY OF ARGUMENT

The transferee Court had authority to dispose of Lexecon's case against Cotchett by dispositive pretrial motion. That authority is provided by statute, JPML Rule, unanimous case law, and is also conceded in the dissenting opinion in the Court of Appeals upon which Lexecon relies.

Furthermore, Lexecon's filing of a motion to refer for remand did not divest the transferee Court of that authority. There is no law to support such a contention, or a principled or persuasive reason to create such law. That would be contrary to the 28 U.S.C. § 1407(b)'s mandatory command that "pretrial proceedings shall be conducted" by the transferee court. It would also undermine the MDL process by empowering a litigant to interrupt and terminate *pending* pretrial proceedings (*i.e.*, Cotchett's motion for summary judgment here) in the transferee court merely by filing a motion to refer for remand.

Moreover, since Lexecon abandoned its appeal from the summary judgment obtained by Cotchett, and has not demonstrated any substantive error or prejudice with respect thereto, Lexecon's attempt to reverse Cotchett's summary judgment should also be rejected by virtue of 28 U.S.C. § 2111 as academic and "harmless."

Finally, Lexecon invoked and accepted the benefits from the transferee Court's authority it now claims was nonexistent. Thus, it should be estopped from contending the District of Arizona could not rule on summary judgment motions.

ARGUMENT

A TRANSFEREE COURT'S AUTHORITY TO TERMINATE A CASE BY PRETRIAL DISPOSITIVE MOTION IS UNCONTESTED AND BEYOND CHALLENGE.

A MDL transferee court's authority to adjudicate dispositive motions is confirmed by the language of the statute, its legislative history, MDL Rule, and unanimous case law. *See* 28 U.S.C. § 1407(a) (no remand if case "previously terminated" in the transferee court); 28 U.S.C. § 1407(b) (plenary authority to conduct "pretrial proceedings"); H. Rep. No. 1130, 90th Cong. 2d Sess., 1968 U.S.C.C.A.N. at 1900 ("The transferee district court would have authority to render summary judgment."); Rule 14(a), JPML ("[a]ctions terminated in the transferee district court by valid judgment, including, but not limited to summary judgment . . . shall not be remanded . . . "); *In Re Korean Airlines*, 829 F.2d at 1172, 1178 (D.C. Cir. 1987) (concurring opinions), *aff'd* 490 U.S. 122 (1989); numerous cases cited in 15 Wright, Miller & Cooper, *Federal Practice & Procedure*: Jurisdiction 2d § 3866, n. 10 (2d Ed. 1986) and Supp. Serv., 3/97 ("transferee court has the authority to enter dispositive orders terminating cases"); Manual for Complex Litigation § 31.132 at 253 (3d Ed. 1995); Weigel, *The Judicial Panel on Multi-District Litigation, Transferor Court and Transferee Courts*, 78 F.R.D. 575, 582-83 (1978).

The dissenting Judge in the Court of Appeals did not dispute the foregoing authorities:

> It is true that an MDL court can dispose of a case by settlement or motion and thus prevent the JPML from remanding it. But that is a possibility expressly accounted for in section 1407(a),

> which releases the JPML from its obligation to transfer the case back to its originating district if "it shall have been previously been terminated." * * * Congress may have felt that federal judges are fungible for purposes of resolving legal questions . . .

J.A. 65-66, 68.

THE CONTENTION THAT THE MERE FILING OF A MOTION TO REFER FOR REMAND DIVESTS THE TRANSFEREE COURT OF AUTHORITY TO DECIDE THEN PENDING DISPOSITIVE PRETRIAL MOTIONS HAS NO BASIS IN LAW AND WOULD UNDERMINE MDL PRACTICE.

A. Lexecon's contention.

The dissent below, after determining that the District Court abused its discretion in transferring the remaining claim against Milberg "to itself" under 28 U.S.C. § 1404(a), concluded "[w]e must therefore vacate that order and all *subsequent orders* entered by the district court including, of course, the final judgment entered after trial" (emphasis added). J.A. 79. That conclusion would not affect Cotchett since the orders dismissing all claims against them were entered *prior to* the transfer Order.

However, the dissent also states, in a footnote and without citation to authority, that "all orders" entered *after* Lexecon filed its motion to refer for remand "on August 5, 1994," "particularly the summary judgment granted on April 24, 1995, should be vacated." J.A. 79, n. 22. It is that supplemental conclusion that Lexecon urged in the Court of Appeals and what it seeks to achieve in

this Court. Brief, pp. 11, 32. It assumes, without reference to the record, that "all coordinated and/or consolidated pretrial proceedings" had terminated when it filed its motion to refer for remand on August 5, 1994. It then argues, without citation to any MDL case law authority, that the transferee Court was then and there divested of all authority to act on pending as well as future motions. *Id.* at 18.

Elsewhere in its Brief, Lexecon argues that there never were "any coordinated or consolidated pretrial proceedings." *Id.* at 7. However, it never challenged the JMPL'S transfer order as provided for in 28 U.S.C. § 1407(e), and litigated for over a year in the transferee district before moving for remand, engaging in extensive motion practice, discovery, and multiple petitions to the Ninth Circuit. Lexecon waived its right to contest the MDL transfer, participated in it for over a year, and should be judicially estopped from collaterally attacking it in this Court.

B. No basis in law or practice.

There is no basis in the MDL statute, its legislative history, case law, policy, or legal commentary, for the position that the mere filing of a motion to refer for remand divests the transferee court of authority it otherwise undisputedly has to decide pending dispositive pretrial motions. If Congress intended the mere filing of a motion to refer for remand to terminate the authority of the transferee court, it could easily have enacted such a provision.

Moreover, such a rule would undermine the MDL process. It would empower a litigant to unilaterally terminate proceedings in the transferee court merely by filing a motion for remand. Taken to its logical extent, such a motion could be filed the day after transfer to preclude the transferee court from conducting any pretrial proceedings mandated by statute and JPML orders.

C. No claim of substantive error or showing of prejudice.

Such a drastic rule is particularly inappropriate where, as here, there is no assignment of error in the summary judgment and no showing of prejudice. Lexecon abandoned its appeal of the summary judgment in favor of Cotchett by not arguing it in its Opening Brief in the Court of Appeals. *E.g., Officers of Justice v. Civil Serv. Comm.*, 979 F.2d 721, 725 (9th Cir. 1992). It made no attempt in the Court of Appeals, or in its Brief in this Court, to demonstrate that there was a material issue of fact with respect to the claims against Cotchett dismissed on summary judgment.

Furthermore, Lexecon made no attempt in the Court of Appeals, and makes no attempt in its Brief in this Court, to demonstrate actual prejudice as the result of the District Court in Arizona (rather than the District Court in Illinois) deciding the summary judgment motion. Lexecon may have a strategic *preference* for a particular federal judge, but it has no *right* to have any particular federal judge hear and decide motions. To paraphrase the dissenting Judge below, federal judges are "fungible" for

such purposes. J.A. 68. Lexecon's appeal from the Cotchett judgment is barred by 28 U.S.C. § 2111.

Also, an adjudication free of error and prejudice in a court with jurisdiction and venue should not be vacated even if there were an erroneous refusal to transfer venue. *Caterpillar, Inc. v. Lewis*, 117 S.Ct. 467 (1996). *See also Montana v. U.S.*, 440 U.S. 147, 153-54 (1979) ("To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.")

D. Estoppel.

Finally, Lexecon should be estopped from contending that the transferee Court lost its authority to rule on dispositive pre-trial motions when it filed its motion to refer for remand. Thereafter, Lexecon invoked that very authority, without express reservation, and benefitted from it. *See, e.g., Rosen v. Rae*, 647 P.2d 640 (Ariz. App. 1982); *In Re Denney*, 135 F.2d 184, 186 (7th Cir.), *cert. denied sub nom., Denney v. Fort Recovery Banking Co.*, 320 U.S. 474 (1943); 4 *C.J.S.* Appeal & Error § 193 (1993); *see generally, Donovan v. Penn Shipping Co.*, 429 U.S. 648 (1977).

CONCLUSION

If the Court determines that it was error for the District of Arizona to try the defamation claim against the Milberg Defendants, and such error were prejudicial and not waived, then only that claim should be retried in Illinois. In all events, the summary judgment obtained by the Cotchett Respondents during the course of pretrial proceedings should not be disturbed.

The separate judgment entered in favor of the Cotchett Defendants on pretrial motions should be affirmed.

Respectfully submitted,

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Dated: August 18, 1997

APPENDIX 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

In re AMERICAN CONTINENTAL/LINCOLN SAVINGS & LOAN SECURITIES LITIGATION.	MDL Docket No. 834 CV 93-1087 PHX JMR
LEXECON INC. and DANIEL R. FISCHEL, Plaintiffs, vs. MILBERG WEISS BERSHAD HYNES & LERACH, et al., Defendants.	**ORDER** (Filed June 7, 1995)

The Court having previously granted summary judgment in favor of defendants Cotchett, Illston & Pitre, Joseph Cotchett, and Susan Illston, and there being no just reason for delay of entry of a final judgment in their favor pursuant to Rule 54(b), Federal Rules of Civil Procedure.

IT IS HEREBY ORDERED that plaintiffs' claims against said defendants **ARE DISMISSED WITH PREJUDICE.**

Dated this 2nd day of June, 1995.

/s/ John M. Roll
JOHN M. ROLL
United States
District Judge

APPENDIX 2

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

In re AMERICAN CONTINENTAL CORPORATION/LINCOLN SAVINGS & LOAN SECURITIES LITIGATION.	)	MDL Docket No. 834
LEXECON INC. and DANIEL R. FISCHEL, Plaintiffs, vs. MILBERG WEISS BERSHAD HYNES & LERACH, a partnership, *et al.*, Defendants.	)	No. CIV 93-1087 PHX JMR Hon. John M. Roll, *Judge Presiding*

NOTICE OF APPEAL

Notice is given that plaintiffs Lexecon Inc. and Daniel R. Fischel hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Order entered on November 29, 1993 granting in part the motion of defendants Cotchett, Illston & Pitre, Joseph Cotchett and Susan Illston to dismiss the Amended Complaint, the Order

entered on December 15, 1994 denying plaintiffs leave to file their proposed Second Amended Complaint, and the Order entered on April 24, 1995 granting the motion of defendants Cotchett, Illston & Pitre, Joseph Cotchett and Susan Illston for summary judgment on plaintiffs' remaining claims, all of which are final judgments with respect to defendants Cotchett, Illston & Pitre, Joseph Cotchett and Susan Illston as a result of the district court's entry of a Rule 54(b) certification on June 7, 1995.

Dated: July 3, 1995

Respectfully submitted,

/s/ A. Bates Butler III
One of the attorneys for
plaintiffs Lexecon Inc. and
Daniel R. Fischel

APPENDIX 3

[DOCKET SHEET EXCERPT]

On June 7, 1995 an order was entered granting the Cotchett defendants' motion for a certification of the judgment in their favor under Rule 54(b).

3. Issues Proposed To Be Raised On Appeal

Whether the district court erred in dismissing plaintiffs' abuse of process, malicious prosecution and several defamation claims under Rule 12(b)(6) and in refusing to permit plaintiffs to file a proposed Second Amended Complaint on the ground that it also failed to state a claim.

Whether the district court erred in granting summary judgment on the remaining claims for tortious interference, defamation, commercial disparagement and violation of the Illinois Consumer Fraud and Deceptive Practices Act.

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether a district court conducting "pretrial proceedings" under the express grant of authority in 28 U.S.C. § 1407 is empowered to order a transfer for trial under 28 U.S.C. § 1404(a).

2. Whether this Court should vacate a judgment entered after an error-free trial, based solely on petitioners' claim that the case should not have been retained in Arizona for trial, when petitioners never asked the Judicial Panel on Multidistrict Litigation to remand the action to the transferor court, petitioners have never alleged any concrete prejudice caused by the locus of the trial, and the sole claim that survived for trial should have been dismissed as a matter of law during pretrial proceedings.

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IN THE

Supreme Court of the United States

October Term, 1996

No. 96-1482

LEXECON INC., *et al.*,

Petitioners,

vs.

MILBERG WEISS BERSHAD HYNES & LERACH, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF FOR RESPONDENTS MILBERG WEISS BERSHAD HYNES & LERACH, *et al.*

The law firm of Milberg Weiss Bershad Hynes & Lerach, along with Patrick Coughlin, William S. Lerach, Kevin P. Roddy, Leonard B. Simon, Melvyn I. Weiss, Patricia Hynes, Michael C. Spencer, and Stephen R. Steinberg (the "Milberg respondents") file this brief for respondents.[1]

STATUTES INVOLVED

The multidistrict litigation statute, 28 U.S.C. §§ 1407(a), (b), (e), (f), and (h), and the federal transfer statute, 28 U.S.C. § 1404(a), are reprinted in the appendix.

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[1] The remaining respondents — the law firm of Cotchett, Illston & Pitre, along with Joseph Cotchett and Susan Illston (the "Cotchett respondents") — will file a separate brief.

STATEMENT OF THE CASE

Petitioner Lexecon Inc. ("Lexecon") was a defendant in the massive litigation arising from the failure of the Lincoln Savings & Loan Association that was consolidated in the District of Arizona. Lexecon was named because it had prepared reports for federal and state regulators in which, despite having received regulators' reports showing extensive regulatory violations and criminal activity involving Lincoln Savings, Lexecon represented that "Lincoln is sound," is "safer than comparable thrifts," and is "safer than when acquired." In the *Lincoln Savings* case, Lexecon failed to obtain dismissal of the claims against it, failed to win summary judgment after extensive discovery, and failed to obtain a directed verdict after a four-month trial. Ultimately, as jury deliberations were about to commence, Lexecon paid the *Lincoln Savings* class more than $700,000 to avoid what would have been, in the words of the trial judge, a "possible catastrophic verdict."

Lexecon and one of its principals, Daniel R. Fischel, then attempted to revive the dispute in another forum — filing this case against respondents, who served as counsel for the *Lincoln Savings* class, alleging that the claims of the class were "baseless," that those claims were "terminated in Lexecon's and Fischel's favor," and that Lexecon had not settled but had decided "voluntarily" to "benefit the class" by paying it more than $700,000. Unsurprisingly, the Judicial Panel on Multidistrict Litigation ("MDL Panel" or "Panel") concluded that this new case involved questions in common with the still-pending *Lincoln Savings* litigation and transferred the case to the District of Arizona, where it was assigned to a new district judge. That court either dismissed or granted summary judgment for the defendants on nearly all of petitioners' claims. After the court transferred petitioners' sole remaining claim to Arizona for trial under section 1404(a), the jury unanimously rejected that claim. Petitioners, without identifying any error or unfairness in the trial, now seek to overturn the final judgment based solely on the assertion that the trial transfer was improper.

1. The *Lincoln Savings* Litigation And Lexecon's Role In That Litigation.

Lincoln Savings involved multiple lawsuits brought in various districts against Charles Keating, American Continental Corporation ("ACC"), its subsidiary Lincoln Savings, and approximately one hundred other defendants, including Lexecon. Those lawsuits were all transferred by the MDL Panel under 28 U.S.C. § 1407 to the District of Arizona, to be supervised by the Hon. Richard M. Bilby. By the end of that litigation, class counsel had secured a $1.2 billion jury verdict and more than $240 million in settlements for their clients.[2]

The claims against Lexecon arose from Lexecon's preparation, for submission by ACC/Lincoln to federal and state banking regulators, of false reports advocating the purported safety of Lincoln's operations and the value of Lincoln's assets. The plaintiff class alleged that Lexecon, by issuing those false reports despite having reviewed government analyses detailing Lincoln's criminal misconduct, wrongfully assisted in propping up Lincoln Savings long enough for ACC/Lincoln to sell millions of dollars of worthless securities. *In re American Continental Corp./Lincoln Sav. & Loan Sec. Litig.*, 794 F. Supp. 1424, 1448 (D. Ariz. 1992).

After extensive discovery, Lexecon filed a motion for summary judgment, which Judge Bilby denied in a published opinion. *Id.* at 1448-49. The court observed that Lexecon's reports asserted that Lincoln Savings was both "sound" and "safe," even though Lexecon

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[2] The summary of facts that follows is derived principally from judicial decisions. In contrast, petitioners' statement of facts is derived principally from the highly creative allegations in their complaint. *See* Pet. Br. 3-4. As shown below, those are the same allegations that were declared false by the *Lincoln Savings* trial judge and dismissed by the district court below in a decision that was affirmed by the Ninth Circuit. With the Court's denial of *certiorari* as to the second question presented in this case, petitioners have reached the end of the road in their efforts to revive their rejected allegations concerning what happened in *Lincoln Savings*. In these circumstances, petitioners' continued portrayal of those same allegations as being factual is both misleading and highly inappropriate.

knew about Lincoln's prior wrongdoing, having received and reviewed a Federal Home Loan Bank Board examination report that catalogued Lincoln's "extensive regulatory violations." The district court further observed that "Lexecon knew of Ivan Boesky's plea of guilty to insider trading violations, and of [the Federal Home Loan Bank Board's] concerns about ACC/Lincoln's holdings in the Boesky high yield fund" — junk bond holdings that materially contributed to Lincoln's eventual collapse. In those circumstances, the court concluded that material issues of fact existed as to the falsity of Lexecon's representations. *Id.* at 1448-49; J.A. 32.

In March 1992, Judge Bilby, sitting as an MDL transferee judge, transferred the litigation to his regular docket for trial. Lexecon, although now arguing that such a transfer order is contrary to section 1407, voiced no objection to the transfer for trial. After a four-month trial, Lexecon filed a motion for directed verdict. The court denied the motion, concluding that substantial evidence had been adduced showing that Lexecon had prepared false reports lauding Lincoln's supposed financial integrity even though Lexecon knew that Lincoln was engaging in criminal activities and providing unreliable information:

> [Lexecon] knew all of these bad things about Lincoln. They'd read them. They were writing this report to help . . . [Lincoln's counsel] respond to it. . . . [I]t's obvious that there is a jury question as to whether they [Lexecon] weren't in it much deeper than that.

CR113 Ex. B at 11946-47.[3]

2. Lexecon Settles The Claims Against It To Avoid A Potentially Disastrous Jury Verdict.

On June 22, 1992, as jury deliberations were about to commence, Judge Bilby and counsel for Lexecon and the class

[3] "CR" refers to the record below. "LSCR" refers to the record in *Lincoln Savings*.

participated in an in-chambers settlement conference. Lexecon stated that it wished to avoid a jury verdict, but did not want to be perceived as having "settled" for fear of the effect that might have on Lexecon's professional reputation. J.A. 32. Attempting to accommodate Lexecon's purported concern, Judge Bilby and class counsel agreed to a settlement that was structured so as not to appear to be a standard settlement. Under that "unusual arrangement," Lexecon ultimately paid over $700,000 to the class in exchange for being dismissed. J.A. 32-33.

After Lexecon settled, the jury found all of the remaining defendants liable and assessed damages of $3 billion. LSCR4044-47. Judge Bilby later remitted the award to $1.2 billion. LSCR4325.

3. Petitioners Sue Class Counsel In Federal Court In Chicago And The *Lincoln Savings* Judge Finds That Petitioners' Principal Allegations Are "False."

On November 25, 1992, Lexecon and Fischel filed this diversity action against the Milberg respondents, the Cotchett respondents, and other class counsel, asserting claims of malicious prosecution, abuse of process, tortious interference, defamation, and commercial disparagement. CR1; J.A. 33. Petitioners alleged that *Lincoln Savings* "was terminated in Lexecon's and Fischel's favor," that class counsel "implicitly acknowledg[ed] the lack of merit in their complaint" by agreeing to dismiss Lexecon, and that in paying $700,000, Lexecon "voluntarily" decided to "benefit the class" by "returning the professional fees paid to it by Lincoln and Keating." CR1 ¶¶ 63-64, 92. Apparently hoping to avoid having to defend those factual claims in a forum familiar with the actual underlying events, petitioners chose to file the case in the Northern District of Illinois, a judicial district with no connection to the controversy except for the fact that Lexecon is headquartered there.

On December 7, 1992, Judge Bilby, who was presiding over the still-pending *Lincoln Savings* litigation, convened a hearing by

telephone with class counsel and Lexecon's trial counsel.[4] Judge Bilby expressed grave concern over petitioners' allegations in the Chicago action, including the contention that *Lincoln Savings* had been terminated in Lexecon's favor: "[C]ertainly I would not have been a party to any resolution of this case if I thought it was going to be the basis for someone saying well, Lexecon won the case. . . . I think that this Court has been misused and misled." CR18 Ex. E at 5-6. Judge Bilby directed the parties to file submissions explaining "why I shouldn't . . . set aside the dismissal of this case without prejudice and reinstate the plaintiffs' claim." *Id.* at 6. During a subsequent court hearing, Judge Bilby told Lexecon "you have no right to come in and misrepresent to a judge in Chicago . . . what this, quote, settlement or resolution was, because . . . it wasn't any voluntary payment on your part. . . . I can put up with cornery lawyers, I can put up with contentious lawyers, but I can't put up with the kind of stuff that absolutely misrepresents what was done in my chambers by a group of lawyers." CR18 Ex. K at 44-45; *see id.* at 49-50 ("[Lexecon] wanted to get out of having to go to that jury. . . . [I]t was a bargained-for deal. I mean, how can you say it any other way than that?"); *id.* at 48-49 ("[T]he allegations on Page 24 are just absolutely false. . . . I mean, it sounds like Lexecon's Santa Claus.").

On December 31, 1992, Judge Bilby issued an order "to clarify the terms and conditions" of the dismissal of Lexecon. J.A. 33-35 n.2.[5] That order outlined petitioners' principal allegations in the Chicago suit against class counsel and stated:

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[4] Although the *Lincoln Savings* trial had concluded, no final judgment had been entered because various settlements and other matters had not been completed. A final judgment order was not entered until March 1994. J.A. 35.

[5] The court explained that "[a]s this dismissal was without prejudice [it] retained jurisdiction . . . to clarify the terms and conditions of that dismissal." J.A. 33 n.2. The court added that "pursuant to Fed. R. Civ. P. 60(a) the Court of its own initiative may correct any errors or omissions of the record." *Id.*

> The Court finds these paragraphs [Compl. ¶¶ 63, 64, and 92] to be a false description of the conditions under which Lexecon was dismissed from [the *Lincoln Savings*] case. . . . [I]t does not meet with reality and is factually incorrect.

J.A. 34 n.2. The court emphasized that Lexecon's payment to the class was not "voluntary," but was made so that Lexecon would not have to face a "possible catastrophic verdict." CR383 Ex. 3 at 3 n.1.

In January 1993, Lexecon appealed Judge Bilby's December 31, 1992 order to the Ninth Circuit. Recognizing its case-dispositive significance, Lexecon described the order in its opening brief as "tantamount to a declaratory judgment in favor of Milberg Weiss as defendants in the Chicago lawsuit." Br. 19. The Ninth Circuit subsequently dismissed Lexecon's appeal as premature because a final judgment in *Lincoln Savings* had not yet been entered. J.A. 35. In March 1994, Judge Bilby entered final judgment. *Id.* However, Lexecon chose not to renew its appeal from that judgment, and thus allowed the findings made in the December 31, 1992 order to become final and not subject to further review. *Id.*

4. Multidistrict Transfer And Proceedings In The District Of Arizona.

In February 1993, the MDL Panel issued a conditional order transferring petitioners' Chicago lawsuit to the District of Arizona, where Judge Bilby was to preside over the litigation along with the remainder of *Lincoln Savings*. As petitioners note, among the reasons cited by the MDL Panel for its conclusion that transfer was appropriate were that there was an extensive document depository in Arizona, there was an opportunity for coordination with non-final settlements, and there was a potential for coordination with a pending Ninth Circuit appeal. J.A. 18-19; Pet. Br. 7. That appeal, as petitioners fail to mention, was *Lexecon's own* appeal of Judge

Bilby's December 31, 1992 order finding petitioners' key allegations *in this case* to be false.[6]

As the court of appeals in this case observed, "Lexecon, to put it gently, was no stranger to the District of Arizona" because this entire case arose there. J.A. 44. Lexecon, a sizeable firm that provides services nationwide, had performed in Arizona the professional services for Charles Keating that were challenged in *Lincoln Savings*. Moreover, before it was sued, Lexecon was retained as an expert to assist another defendant in the *Lincoln Savings* litigation pending in Arizona. After it was sued, Lexecon defended against the claims of the *Lincoln Savings* class in Arizona, raised no objection to the permanent transfer of the *Lincoln Savings* case to Arizona for trial, and acquiesced in Judge Bilby's retention of jurisdiction in Arizona to oversee Lexecon's settlement with the *Lincoln Savings* class. Finally, in this litigation, Lexecon successfully urged application of Arizona law to its key claims. Pet. App. 86a.

After the Panel issued its conditional transfer order, Judge Bilby recused himself because of his involvement in Lexecon's settlement negotiations in *Lincoln Savings*. J.A. 33. As a result, the MDL Panel issued a final order transferring the lawsuit to the District of Arizona for supervision by the Hon. John M. Roll. J.A. 17-19. Although petitioners now assail the propriety of that order, *see* Pet. Br. 6-7, they chose not to challenge the order at the time and cannot do so now. *See* 28 U.S.C. § 1407(e) ("No proceedings for review of any order of the panel may be permitted except by extraordinary writ pursuant to the provisions of title 28, section 1651, United States Code.").

In November 1993, Judge Roll, a former judge of the Arizona Court of Appeals, issued an order dismissing petitioners' Arizona

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[6] As they did in their petition, petitioners also seek to leave the incorrect impression that respondents requested transfer to Arizona to avoid unfavorable rulings that the district court in Chicago already had made. Pet. Br. 6. In fact, the Milberg respondents filed a notice of related action with the Panel on February 9, 1993, *before* defendants filed any responsive pleading and *before* the Chicago judge made any substantive ruling. CR12.

state law claims for malicious prosecution and abuse of process pursuant to Rule 12(b)(6). J.A. 35; Pet. App. 80a-99a. In December 1993, the Milberg respondents moved for summary judgment on petitioners' remaining claims, CR177, CR181, but petitioners successfully moved under Rule 56(f) to defer resolution of the summary judgment motions pending further discovery. CR185; CR192. In August 1994, although discovery had not yet been completed and respondents' summary judgment motions remained pending, petitioners filed a motion requesting that Judge Roll suggest to the MDL Panel that it remand the case to Chicago. CR288. Judge Roll ruled that the motion was premature because discovery was ongoing, but that petitioners could renew their motion after discovery closed. CR311.[7]

On April 24, 1995, Judge Roll entered summary judgment in favor of the Milberg respondents on all of petitioners' claims, except for a defamation claim based on a letter to the editor of *The National Law Journal*. J.A. 36; Pet. App. 64a-79a. The district court held as a matter of law that the majority of the letter's contents were not defamatory, but that a jury question existed as to whether one passage was actionable. Pet. App. 69a-73a.

Thereafter, on May 5, 1995, Judge Roll transferred the case to the District of Arizona pursuant to section 1404(a) for trial of that remaining defamation claim. J.A. 20-21. Petitioners responded by petitioning the court of appeals for a writ of mandamus, which the court denied. J.A. 22-27. On July 25, 1995, trial commenced in Tucson, and on August 1, 1995, the jury returned a unanimous

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[7] After Judge Roll decided to hold petitioners' remand request in abeyance until the close of discovery, petitioners moved for reconsideration. CR328. When that failed, petitioners asked Judge Roll to recuse himself. CR343. Petitioners then attempted to fortify their recusal motion by portraying Judge Roll's senior colleague, Chief Judge Bilby, as an occurrence witness who inevitably would appear at trial. In addition, petitioners subpoenaed Judge Bilby for his deposition and demanded production of his bench files — a litigation stratagem that prompted the United States Attorney for the District of Arizona to intervene with a successful motion to quash. CR386; CR 394; CR430.

verdict in favor of respondents. J.A. 37; Pet. App. 53a-54a. At no time in the 12 months between petitioners' initial remand request and the entry of final judgment did petitioners ask the MDL Panel to remand the case — despite the existence of an MDL rule specifically authorizing such a motion by any party. MDL Rule 14(c), (d).

5. Appellate Proceedings In The Court Below.

On appeal, petitioners challenged the dismissal of their malicious prosecution and abuse of process claims, and further argued that the district court's later order transferring the sole surviving claim for trial was barred by 28 U.S.C. § 1407(a). J.A. 37-44, 48-55. However, petitioners did not assign any error in the court's conduct of trial proceedings, did not identify any prejudice resulting from the fact that those proceedings took place in Tucson rather than in Chicago, and did not allege any jurisdictional or venue defects associated with proceeding in the District of Arizona. Petitioners' sole contention with regard to the transfer order was that they were entitled to relitigate the case because they had been denied their purported right to have the case sent back to the original forum.

The Ninth Circuit, with Judge Kozinski dissenting, affirmed. J.A. 28-80. In an opinion authored by Judge Sneed, the court held that the district court's authority to transfer the case for trial under section 1404(a) is confirmed by the relevant statutory language and legislative history, the rules promulgated by the MDL Panel, and unanimous judicial precedents. J.A. 37-44. Moreover, the court concluded that petitioners were in no position to complain about that result, having failed to request a remand from the MDL Panel, even though only the MDL Panel could order that relief:

> The JPML's duty to remand was not activated. . . . [T]he trigger to such activation was never pulled. . . . Lexecon, in lieu of moving the JPML for a remand, brought its motion before the district court, and now appeals to us for a remedy. Neither this procedure, nor its earlier petition for a writ of mandamus, amounts to a motion for remand brought before the JPML. Lexecon failed to seek succor from the one source that easily could have granted it if it so chose. The district court, therefore, properly proceeded to conduct a trial on the single remaining defamation claim, following the completion of the pretrial proceedings.

J.A. 43-44.[8]

SUMMARY OF ARGUMENT

1. Petitioners seek to claim for themselves the "high road" of fidelity to statutory language and congressional intent. In fact, petitioners seek to have this Court rewrite the actual text of section 1407(a) and ignore the operative language of section 1407(b), which directs that transferee district courts "shall" conduct all "pretrial proceedings."

First, contrary to petitioners' contentions, section 1407(a) concerns the authority of the Panel, not that of the transferee district court. Section 1407(a) does not impose any duty on the transferee district court; instead, section 1407(a) provides that unless the MDL action has been terminated, the cases "shall be remanded *by the panel*" when pretrial proceedings are concluded. That distinction between the duties of the MDL Panel and those of the transferee district court is important, as the court below and other courts have recognized. Section 1407(a) reflects Congress' determination to confer on the Panel an extraordinary power to transfer related cases to one judicial district — including a district in which personal jurisdiction and venue otherwise would not exist. In granting the MDL Panel that extraordinary transfer power, Congress limited the Panel's authority to transfers for pretrial proceedings. Congress did not, as petitioners point out, authorize the MDL Panel to transfer cases for trial. But section 1407(a) does not say anything about limiting the *transferee district court's* power to rule on traditional transfer motions brought under section 1404(a). In deciding motions to transfer under section 1404(a), district courts can order transfer only to districts where the actions might have been brought. Thus, Congress imposed a

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[8] The Ninth Circuit also affirmed the dismissal of petitioners' malicious prosecution and abuse of process claims. J.A. 48-55. This Court declined to review that dismissal.

limitation on the Panel's extraordinary power to transfer cases to any district, including one in which personal jurisdiction and venue are lacking, but Congress did not say anything to suggest that MDL district courts lack authority to consider traditional transfer motions.

Second, petitioners also fail to respect the "plain language" of section 1407(b), which, unlike section 1407(a), does concern the powers of the transferee district court. Section 1407(b) provides that the transferee district court "shall" conduct "pretrial proceedings" in MDL actions. That authority is granted without limitation because Congress intended that upon transfer, the transferee court would supervise pretrial proceedings in the same way as it would in any other case. There is no basis to infer, as petitioners suggest, that the transferee court's power to conduct pretrial proceedings is limited *sub silentio* by the duty to remand imposed in a separate subsection dealing only with the scope of the MDL Panel's extraordinary transfer powers. If Congress truly had intended to limit the transferee district court's authority to conduct pretrial proceedings, it would have done so directly, in describing the transferee court's powers in subsection (b), rather than indirectly, by imposing a limitation on the MDL Panel's extraordinary transfer powers under subsection (a).

In addition to ignoring the governing language of section 1407, petitioners disregard material aspects of the history of its passage, which further undermine petitioners' contentions. Section 1407 was drafted by a special Committee of the Judicial Conference chaired by Chief Judge Alfred P. Murrah of the Tenth Circuit. In presenting the proposed legislation to Congress, the Murrah Committee specifically confirmed that cases might be transferred under section 1404 during consolidated pretrial proceedings. Moreover, within months of the enactment of section 1407, the first MDL Panel, chaired by Chief Judge Murrah, promulgated an MDL Rule expressly recognizing that MDL transferee judges have the same power to transfer cases for trial under section 1404(a) as they would in any other case. 47 F.R.D. 377, 381-82 (1969) (MDL Rule 15(b)). The historical record thus strongly supports the conclusion that the judges who wrote section 1407, and the Congress that ultimately enacted it, intended that section 1404(a) transfers could be ordered by transferee judges conducting "pretrial proceedings" under section 1407(b).

Finally, Congress acquiesced in the practice challenged in this case in 1976, when it enacted section 1407(h). In that provision, Congress revisited its prior determination to limit the MDL Panel's transfer authority to pretrial proceedings and decided to authorize the MDL Panel to transfer for pretrial *and* trial purposes a category of antitrust cases to any district. That provision is significant, among other reasons, because its introductory clause lists the impediments to transfers for trial purposes, but fails to list section 1407(a). Thus, Congress did not perceive any impediment to trial transfers imposed by section 1407(a). Moreover, the introductory clause expressly refers to section 1404, which shows that in 1976 Congress was well aware of the role that section 1404 transfers could play in section 1407 proceedings and acquiesced in that role.

2. Petitioners are equally incorrect in arguing that, even if a transferee court has the power to grant a trial transfer under section 1404(a), it cannot transfer the case to its own district. That argument is not within the question presented. In any event, such a transfer is, in fact, to an "other district" within the meaning of section 1404(a) because it changes the district in which the case otherwise would be tried.

3. Even assuming that Congress did intend that all MDL cases be remanded to their original districts for trial, that conclusion would not justify reversal of the judgment below.

First, petitioners never requested a remand from the MDL Panel — the sole tribunal empowered by the plain language of section 1407 to order that relief. Any duty to remand that may be imposed by section 1407 rests on the Panel. The Panel, in turn, has promulgated rules of procedure authorizing parties to file remand motions directly with the Panel. By failing to comply with the express statutory language and applicable MDL rule, petitioners deprived the Panel of the opportunity to evaluate petitioners' facial attack on the MDL rule that authorizes the trial transfer procedure challenged in this case. Moreover, by doing so, petitioners also avoided the statutory command that all Panel rulings shall be reviewable only by a petition for writ of mandamus.

Second, allowing petitioners to raise the remand issue after the entry of a final judgment would be particularly indefensible, because petitioners never have claimed any unfairness or error in the trial proceedings below — which indisputably occurred in a judicial district in which this case might have been brought originally. In deciding whether to reverse a judgment, this Court is required to disregard errors that caused no prejudice. *See* 28 U.S.C. § 2111 (emphasis added) ("On the hearing of any appeal or *writ of certiorari* in any case, the court *shall* give judgment . . . without regard to errors or defects which do not affect the substantial rights of the parties."). Because petitioners have not claimed any error in the trial or prejudice resulting from its location, any error in the district court's trial transfer order was plainly harmless. As this Court unanimously held last year in rejecting another plaintiff's challenge to a federal court judgment on the basis of an erroneous refusal to remand, the result petitioners seek is "incompatible with the fair and unprotracted administration of justice." *Caterpillar, Inc. v. Lewis*, 117 S. Ct. 467, 477 (1996). Petitioners do not even mention, let alone address, *Caterpillar* in their brief.

Third, the trial transfer issue need never have arisen because the sole defamation claim that survived for trial should have been dismissed as a matter of law during pretrial proceedings. *See Time, Inc. v. Pape*, 401 U.S. 279 (1971).

Finally, even if this Court were to announce a new rule overturning 30 years of MDL precedent, that new rule should be applied only prospectively. *See Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971).

4. Petitioners ask this Court to vacate all orders, apparently including the district court's summary judgment rulings, that were entered "after the conclusion of consolidated pretrial proceedings." Pet. Br. 32. But the only question presented in this case is whether the district court had authority to "transfer the case to itself *for purposes of trial*." Because the district court's summary judgment rulings were entered *before* the transfer order, and because the court's authority to enter those rulings is beyond dispute, petitioners' attempt to expand the potential relief encompassed by the question presented for review should be rejected.

ARGUMENT

I. THE DISTRICT COURT WAS EMPOWERED TO TRANSFER THE SOLE SURVIVING CLAIM FOR TRIAL.

Throughout their brief, petitioners blur important distinctions among sections 1407(a), 1407(b), and 1404(a). When those distinctions are fully understood, it becomes clear that Congress never had any intention of barring section 1404(a) trial transfer orders by MDL transferee courts.

A. The Plain Language.

Section 1407(a) concerns the authority of the Panel. That section establishes a procedure for transferring related cases pending in multiple districts to a single district for consolidated pretrial proceedings. A significant innovation of that statute is that it vests in a single tribunal, the MDL Panel, the authority to consolidate related cases in "any district," regardless of whether personal jurisdiction and venue would have been proper in that district. *See* 28 U.S.C. § 1407(a); *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 163 (2d Cir. 1987) (citation omitted) ("'[t]ransfers under section 1407 are simply not encumbered by considerations of in personam jurisdiction and venue'"), *cert. denied*, 484 U.S. 1004 (1988).

Unlike section 1407(a), which concerns the authority of the MDL Panel, section 1407(b) defines the authority of the district courts to which MDL cases are transferred. Among other things, section 1407(b) mandates that the district court "shall" conduct "pretrial proceedings." *See* 28 U.S.C. § 1407(b). Section 1407(b) does not contain any limitation on the transferee court's authority to conduct pretrial proceedings.

Like section 1407, section 1404(a) provides for transfers of civil actions, but there also are key differences. Section 1404(a) authorizes

"a district court" to transfer civil actions for all purposes including trial, which is a broader power than Congress gave the MDL Panel under section 1407(a). But the district court's broad power to transfer civil actions for trial is also subject to a significant limitation. Unlike the MDL Panel's extraordinary power to transfer cases to districts without regard to personal jurisdiction or venue, a district court can order a section 1404(a) transfer only to a "district or division where [the action] might have been brought." 28 U.S.C. § 1404(a); *see In re New York City Mun. Sec. Litig.*, 572 F.2d 49, 51 (2d Cir. 1978) (Friendly, J.) ("§ 1407, unlike §§ 1404 and 1406, authorizes transfer of an action 'to any district' and not simply to a district where the action could have been brought. The use of this different language was deliberate; indeed, the limitation in § 1404 was one of the reasons why it was necessary to enact § 1407 . . . . ").

Ignoring the distinct features of those three provisions, petitioners isolate one passage in section 1407(a) and use it to challenge the result below. Specifically, petitioners rely on the clause providing that section 1407 actions "shall be remanded *by the panel*" at the conclusion of pretrial proceedings unless they have been terminated. According to petitioners, because Congress limited the MDL Panel's extraordinary authority to order a transfer to a district in which personal jurisdiction and venue would not otherwise exist, that limitation on the MDL Panel under section 1407(a) should be interpreted by this Court as a limitation on the transferee district court's authority to rule on a traditional trial transfer motion under section 1404.

Petitioners' argument is not persuasive. There is no reason to believe that, in legislating the duties of the MDL Panel under section 1407(a), Congress intended by implication to bar the transferee district court from adjudicating one type of motion that is frequently filed in the federal district courts during pretrial proceedings — a transfer motion under section 1404. To be sure, section 1407(a) reflects Congress' determination to limit the MDL Panel's extraordinary authority to transfer related actions to a single district without regard to personal jurisdiction and venue requirements. Congress limited that power to transfers for pretrial proceedings. But nothing in that provision suggests any intent on the part of Congress

to foreclose MDL district courts from using preexisting statutory authority to transfer MDL actions under section 1404(a) to districts where the actions "might have been brought," or from otherwise exercising their Article III powers to the fullest extent.

Indeed, every court that has considered the issue since Congress enacted section 1407 almost 30 years ago has rejected petitioners' reading of the statute. *See In re Korean Air Lines Disaster*, 829 F.2d 1171, 1178 (D.C. Cir. 1987) (D. H. Ginsburg & Williams, JJ., concurring) ("Congress contemplated that transferred cases might never return to the transferor courts, but instead might be . . . transferred under section 1404(a) to that same transferee court."), *aff'd on other grounds sub nom. Chan v. Korean Air Lines*, 490 U.S. 122 (1989); *Pfizer, Inc. v. Lord*, 447 F.2d 122, 124-25 (2d Cir. 1971) *(per curiam)*; *In re Fine Paper Antitrust Litig.*, 685 F.2d 810, 819-20 (3d Cir. 1982), *cert. denied*, 459 U.S. 1156 (1983); *In re Food Lion, Inc. Fair Labor Standards Act "Effective Scheduling" Litig.*, 73 F.3d 528, 532 & n.7 (4th Cir. 1996); *accord* MDL Rule 14(b); P. Howard, *A Guide to Multidistrict Litigation*, 124 F.R.D. 479, 479 (1989); S. Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts*, 78 F.R.D. 575, 581 (1977). So established is the transfer procedure at issue that the *Manual for Complex Litigation* itself provides that "the transferee judge may transfer cases for trial to any district, including the § 1407 transferee district, permitted by 28 U.S.C. § 1404." *Manual for Complex Litigation, Third* § 31.132, at 254 & n.807 (1995).[9]

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[9] *See also In re Air Crash Disaster*, 86 F.3d 498, 512 (6th Cir. 1996); *In re Bendectin Litig.*, 857 F.2d 290, 295 (6th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989); *Kohr v. Allegheny Airlines, Inc.*, 504 F.2d 400, 402 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975); *Washington Pub. Utils. Group v. United States Dist. Ct.*, 843 F.2d 319, 326 (9th Cir. 1988); *Johnson v. Continental Airlines Corp.*, 964 F.2d 1059, 1061 (10th Cir. 1992); *In re Mahurkar Double Lumen Hemodialysis Catheter Patent Litig.*, 750 F. Supp. 330, 332 (N.D. Ill. 1990) (Easterbrook, J., sitting by designation); *In re Air Crash Disaster*, 737 F. Supp. 391, 393 (E.D. Mich. 1989); *In re Tax Refund Litig.*, 723 F. Supp. 922, 923-24 (E.D.N.Y. 1989); *In re Longhorn Sec. Litig.*, 573 F. Supp. 274, 276 (W.D. Okla. 1983); *In re Viatron Computer Sys. Corp. Litig.*, 86 F.R.D. 431, 432 (D. Mass. 1980); *In re Air Crash Disaster*, 476 F.

The statutory provision setting forth the powers of MDL transferee courts is not section 1407(a), which deals with the powers of the MDL Panel, but section 1407(b). The plain language of section 1407(b), which petitioners would have this Court ignore, provides in mandatory terms that "pretrial proceedings *shall* be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation." 28 U.S.C. § 1407(b) (emphasis added). As the MDL Panel confirmed shortly after the passage of section 1407, the term "pretrial proceedings" self-evidently includes rulings on transfer motions under section 1404(a): "A transferee judge under Section 1407 has the responsibility for all pretrial proceedings in litigation assigned to him and the [section 1404(a)] motion before [the transferee court] is certainly a 'pretrial' motion." *In re CBS Color Tube Patent Litig.*, 342 F. Supp. 1403, 1404-05 (J.P.M.L. 1972).

Numerous other courts have confirmed that same point. As Judge Easterbrook stated while sitting by designation as a section 1407 transferee judge: "One of the *pretrial questions* within my province is whether to accept the magistrate's report and transfer the action to Illinois (that is, to me) under § 1404(a)." *In re Mahurkar Double Lumen Hemodialysis Catheter Patent Litig.*, 750 F. Supp. 330, 332 (N.D. Ill. 1990) (emphasis added); *accord Greyhound Computer Corp. v. IBM Corp.*, 342 F. Supp. 1143, 1145 (D. Minn. 1972); *In re Antibiotic Antitrust Actions*, 333 F. Supp. 299, 302-03

Supp. 445, 450 (J.P.M.L. 1979); *In re Anthracite Coal Antitrust Litig.*, 436 F. Supp. 402, 403-04 (J.P.M.L. 1977); *In re Bristol Bay, Alaska, Salmon Fishery Antitrust Litig.*, 424 F. Supp. 504, 507 (J.P.M.L. 1976); *In re Molinaro/Catanzaro Patent Litig.*, 402 F. Supp. 1404, 1405-06 (J.P.M.L. 1975); *Alaska Airlines v. United States*, 399 F. Supp. 906, 912 (N.D. Cal. 1975); *In re Bomb Disaster*, 399 F. Supp. 1400, 1403 (J.P.M.L. 1975); *In re Nat'l Student Mktg. Litig.*, 358 F. Supp. 1303, 1304 (J.P.M.L. 1973); *In re Brown Co. Sec. Litig.*, 355 F. Supp. 574, 577 (S.D.N.Y. 1973); *In re Air Crash Disaster*, 346 F. Supp. 533, 534 (J.P.M.L. 1972); *In re CBS Color Tube Patent Litig.*, 342 F. Supp. 1403, 1404-05 (J.P.M.L. 1972); *In re Air Crash Disaster*, 342 F. Supp. 1400, 1403 & n.4 (J.P.M.L. 1973); *In re Air Crash Disaster*, 342 F. Supp. 907, 909 (D.N.H. 1971); *Jack Winter, Inc. v. Koratron Co.*, 326 F. Supp. 121, 123 (N.D. Cal. 1971).

(S.D.N.Y.), *mandamus denied sub nom. Pfizer, Inc. v. Lord*, 447 F.2d 122 (2d Cir. 1971); *Jack Winter, Inc. v. Koratron Co.*, 326 F. Supp. 121, 123 (N.D. Cal. 1971). Indeed, although Professor Charles Alan Wright appeared as an *amicus* supporting the petition for certiorari in this case, the treatise on federal practice that he co-authored with Professors Arthur R. Miller and Edward H. Cooper confirms that a motion to transfer under section 1404(a) is a "pretrial motion" that "falls naturally within the transferee judge's statutory power to control all pretrial proceedings." 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3866, at 620 (2d ed. 1986).

Congress' straightforward and unqualified command that MDL transferee judges "shall" conduct "pretrial proceedings" reflects its intent that transferee judges would have the same Article III power to render appropriate relief in an MDL action as they would have in any other civil action. As the MDL Panel observed almost 30 years ago, an MDL consolidation order transfers entire 'civil actions,'" not "'civil actions or parts thereof.'" *In re Plumbing Fixture Cases*, 298 F. Supp. 484, 489 (J.P.M.L. 1968). Thus, when a civil action is transferred to the transferee judge, the judge's power to conduct "pretrial proceedings" is unlimited:

> [T]he transfer scheme contemplates that a transferee court will adjudicate transferred cases no differently than cases originally filed before it. This is apparent throughout the scheme, from the point of transfer to the final disposition of the case. Rather than confine the transferee judge merely to presiding over the pretrial phase of cases that may be resolved finally in the transferor courts, section 1407 transfers jurisdiction over whole cases to the transferee court; upon transfer, the transferor courts retain no jurisdiction whatsoever. Indeed, Congress contemplated that transferred cases might never return to the transferor courts, but instead might be settled or resolved by summary judgment in the transferee court, or else transferred under section 1404(a) to that same transferee court for joint trial.

Korean Air Lines, 829 F.2d at 1178 (D. H. Ginsburg & Williams, JJ. concurring); *see also Illinois Brick Co. v. Illinois*, 431 U.S. 720, 763

(1977) (Brennan, J., joined by Marshall and Blackmun, JJ., addressing in dissent an issue not reached by the Court) ("[T]he Judicial Panel on Multidistrict Litigation is empowered by 28 U.S.C. § 1407 to transfer cases involving common questions of fact to any district for coordinated pretrial proceedings . . . [and] [a]fter pretrial transfers under this section, cases can be consolidated and transferred to the same district for trial pursuant to the transfer power under § 1404(a).").[10]

The dissent below questioned whether section 1404 motions fall within the scope of the "pretrial proceedings" that a transferee court is authorized to resolve. J.A. 63-65. But the dissent's view of the statute is based in part on the notion that a transferee court should be considering only "motions that implicate more than a single case" and is constrained to leave motions that affect only one case unresolved for months or years. J.A. 64. Proceeding from that unique view, which finds no support in the statutory language, the dissent next proposed that still another limitation be engrafted onto the term "pretrial proceedings." Specifically, the dissent proposed that transferee courts only should supervise discovery, and that they may not rule on dispositive motions. J.A. 64-66 & n.7; *but see* R. Ragazzo, *Transfer and Choice of Federal Law: The Appellate Model*, 93 Mich. L. Rev. 703, 751-52 (1995) (theory that transferee courts lack power to rule on section 1404 motions and dispositive motions, and should limit themselves to discovery matters, "is contrary to the language of the MDL Act, which gives the MDL court the power to conduct coordinated 'pretrial' proceedings, not merely discovery proceedings"). Given the extent to which the dissent departs from the plain meaning of the statutory language, petitioners

[10] The United States made the same point in its brief *amicus curiae* in *Illinois Brick*: "After pretrial transfers by the Panel [under section 1407], cases can be consolidated and transferred to the same district for trial under Section 1404(a)." *See* Br. at 25-26.

understandably do not urge this Court to adopt the dissent's analysis of section 1407(b).[11]

Instead, as noted above, petitioners argue that section 1407(a) should be interpreted to narrow the scope of section 1407(b). But the plain terms of section 1407(b) categorically authorize the transferee court to exercise full Article III powers in conducting "pretrial proceedings." Petitioners' argument, seeking to limit that plain statutory language, is based entirely on the supposed *implications* of language in section 1407(a) that are not well founded. Section 1407(a) provides that "[e]ach action so transferred shall be remanded *by the panel* at or before the conclusion of such pretrial proceedings . . . unless it shall have been previously terminated." 28 U.S.C. § 1407(a) (emphasis added). By that language, Congress sought to ensure that the MDL Panel's extraordinary authority to transfer actions to any district would apply only to pretrial proceedings. Nothing in section 1407(a) addresses a transferee district court's power to exercise preexisting statutory authority to transfer actions under section 1404(a) to districts in which the action "might have been brought" — a power that is unambiguously encompassed by section 1407(b)'s authorization to conduct "pretrial proceedings." Thus, as the court of appeals correctly held, petitioners' textual argument is unavailing because section 1407(a) is concerned with "creating and defining the functions of the JPML, not [with] redefining or circumscribing the traditional powers of the district court to which a case has been transferred" — powers that are addressed in section 1407(b). J.A. 41; *accord Pfizer*, 447 F.2d at 124 (emphasis in original) (the "shall be remanded" clause "deals *only* with the powers of the Multidistrict Litigation Panel, and not the powers of the judge to whom the case has been assigned").

[11] In reality, the authority of transferee courts to rule on dispositive motions is beyond reasonable dispute. *See, e.g.*, *Korean Air Lines*, 829 F.2d at 1178 (D. H. Ginsburg & Williams, JJ., concurring); *In re Temporomandibular Joint (TMJ) Implants Prod. Liab. Litig.*, 97 F.3d 1050, 1055 (8th Cir. 1996); MDL Rule 14(a); H. Rep. No. 1130, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. 1898, 1900 ("the transferee district court would have authority to render summary judgment").

Petitioners nevertheless seek to salvage their section 1407(a) argument by contending, first, that a transferee court's powers cannot exceed those of the MDL Panel because the transferee court's powers are delegated by the Panel. Pet. Br. 16-17. That contention is meritless. A transferee court's powers are not delegated by the MDL Panel; those powers are created by Congress in the statute itself. Moreover, virtually everything that transferee courts are authorized to do — as Article III courts empowered to adjudicate all pretrial proceedings, including dispositive motions — is beyond the authority of the MDL Panel.

When petitioners purport to address the question of congressional intent, they are no more persuasive. Petitioners repeatedly point out that consolidated proceedings under section 1407 are limited to "pretrial proceedings." Pet. Br. 17-19. But that begs the question whether Congress intended by that limitation on the MDL Panel's extraordinary transfer power to restrict the transferee court's authority to rule on traditional motions to transfer under section 1404. In fact, there is no indication whatever that Congress so intended. As shown in the next section, Congress was fully aware of section 1404 and intended that it would play a role in MDL cases. *See* p. 25 *infra*. Under those circumstances, it would have been strange indeed for Congress to have gone about barring section 1404 transfers by transferee courts, not directly, by adding express limiting language to section 1407(b), but indirectly, by imposing a remand duty on the MDL Panel in section 1407(a).[12]

In the end, petitioners' argument reduces to the notion that there is an irreconcilable conflict between reading section 1407(b) as allowing trial transfers by transferee judges and section 1407(a)'s requirement that the Panel remand the case "to the district from which it was transferred" at the conclusion of pretrial proceedings. But again, petitioners' argument ignores the fact that those provisions

[12] Rather than explain the logic of their position, petitioners seek to persuade this Court by citing a litigation position taken in a brief by the Milberg Weiss firm as counsel in an unrelated case. Pet. Br. 16 n.4. But the fact that Milberg Weiss honored its fiduciary duty to present an argument for a client on an issue of law that this Court has not yet resolved obviously is entitled to no weight.

relate to different matters: Section 1407(b) addresses the transferee district court's traditional power to conduct "pretrial proceedings," and section 1407(a) addresses the MDL Panel's extraordinary power to consolidate related civil actions in any district. In addition, even setting aside that important distinction, section 1404 transfers by MDL district judges are fully consistent with the language of section 1407(a) on which petitioners rely. Section 1407(a) provides that each MDL case "shall be remanded by the panel," but the provision goes on to emphasize "unless the case shall have been previously terminated." Plainly, an action is "terminated," as far as the original district court and the MDL Panel are concerned, when the action is transferred under section 1404(a). *See, e.g.*, MDL Rule 14(b) (upon section 1404(a) transfer, "no further action of the Panel shall be necessary"); *Manual for Complex Litigation, Third*, § 31.132, at 254 (1995) ("An action is closed by appropriate orders entered in the transferee court, without further involvement by the panel or the original transferor court.").

Any other reading would be in tension with the broad language of section 1404(a), which provides that "a district court may transfer *any civil action*." 28 U.S.C. § 1404(a) (emphasis added); *see Ex parte Collett*, 337 U.S. 55, 58 (1949) ("The reach of 'any civil action' is unmistakable. The phrase is used without qualification, without hint that some should be excluded."); 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3843, at 323 (2d ed. 1986) ("By its terms, 28 U.S.C.A. § 1404(a) applies to 'any civil action.' The courts have resisted all attempts to narrow the sweep of that all-inclusive phrase."); 1A J. Moore, *et al.*, *Moore's Federal Practice* ¶ 0.345[4.-1], at 4336 (2d ed. 1996) ("§ 1404(a) blankets the entire field of civil actions to include any and all noncriminal proceedings"). This Court repeatedly has held that the sweeping terms of section 1404(a) apply even to actions governed by special venue provisions. *Braden v. 30th Judicial Circuit Ct.*, 410 U.S. 484, 499 n.15 (1973) (habeas cases); *United States v. National City Lines, Inc.*, 337 U.S. 78, 80-84 (1949) (antitrust cases); *Collett*, 337 U.S. at 71-72 (FELA

cases); *see* 17 J. Moore, *et al.*, *Moore's Federal Practice* § 111.15[1] (3d ed. 1997).[13]

In sum, petitioners' so-called "plain language" argument actually is an invitation to rewrite the governing statutes. Nothing in the language of section 1407 suggests that Congress did not mean what it said when it accorded transferee district courts unlimited authority to conduct "pretrial proceedings" — proceedings that self-evidently include ordering section 1404(a) transfers in appropriate circumstances.

B. The Legislative History And The MDL Panel Rules.

Contrary to petitioners' contentions, Pet. Br. 21-24, the legislative history of section 1407 strongly supports the unanimous view of the federal courts that transferee courts are authorized to adjudicate motions under section 1404. Although petitioners make much of the language in the House and Senate reports noting that the MDL Panel's transfer authority under section 1407 would be limited to authorizing coordinated *pretrial* proceedings, that is simply a restatement of a limitation on the Panel's extraordinary transfer authority that is made clear by the statute itself. In section 1407, Congress limited the Panel's power to consolidate related cases in a single judicial district without regard to whether personal jurisdiction and venue requirements were met. Congress restricted that power to consolidations for pretrial proceedings. That limitation does not justify an inference that Congress also intended to limit the preexisting section 1404 powers of district courts, including transferee district

[13] Petitioners argue that the Congress that passed section 1404 could not have intended to authorize its use by MDL transferee courts, because section 1407 was enacted later. Pet. Br. 20. But Congress' intent in passing section 1404 in 1948 is not the issue. Rather, the question is whether Congress, in passing section 1407 in 1968, intended to preclude transferee district courts from ruling on traditional section 1404 transfer motions. In this regard, we note that section 1404 frequently has been applied in actions brought under *subsequently passed* statutes containing their own venue provisions. *See* 17 J. Moore, *et al.*, *Moore's Federal Practice* § 111.15[1], at 111-120 & nn.10 & 11 (3d ed. 1997) (FOIA and FIRREA actions).

courts, to transfer cases to districts in which those cases might have been brought.[14] Indeed, as the court of appeals recognized, J.A. 41-42, and as petitioners grudgingly (but explicitly) acknowledge in a footnote, Pet. Br. 23 n.7, the very congressional reports cited by petitioners qualify their statements about the desirability of remanding consolidated cases for trial by stating:

> Of course, 28 U.S.C. 1404, providing for changes of venue generally, is available in those instances where transfer of a case for all purposes is desirable.

H. Rep. No. 1130, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. 1898, 1902; S. Rep. No. 90-454, at 5 (1967); *see also* H. Rep. No. 1130, 1968 U.S.C.C.A.N. at 1900 (emphasis added) (section 1407 "would not affect the place of trial in any case *or exclude the possibility of transfer under other Federal statutes*").

Thus, Congress plainly intended that section 1404 would play a role in MDL cases. The only remaining question is whether Congress intended to limit trial transfer motions to the times when they can be raised in the original forum — that is, before an MDL consolidation has occurred or after a case has been remanded. The historical record provides a definitive answer: Contrary to petitioners' extravagant contentions, the procedure of transferee courts considering section 1404 motions is not an unlawful, after-the-fact "power grab" by a group of federal judges bent on enhancing their own powers and expanding their already busy dockets. Pet. Br. 18, 25-26, 29, 31; J.A. 57. Instead, that procedure is a lawful means of resolving complex litigation efficiently and justly that was

[14] Petitioners also resort to sleight of hand in an attempt to make their citations to the legislative history appear more persuasive. Petitioners note in text that the House Report contemplated the possibility of future legislation authorizing the *MDL Panel* to consolidate cases for purposes of trial. Pet. Br. 23. In the accompanying footnote, that reference transforms into a statement "that further statutory amendments would be necessary to allow a *transferee court* the authority to keep a case for trial." Pet. Br. 23 n.7 (emphasis added). Nothing in the House Report comes close to making such a statement or to otherwise supporting petitioners' contentions. Congress clearly was addressing only the limits of the extraordinary power it was conferring upon the MDL Panel.

contemplated by the original *drafters* of the statute — a special Committee of judges of the Judicial Conference who ultimately became the inaugural members of the MDL Panel and who, within months of section 1407's enactment, promulgated a rule expressly authorizing MDL transferee judges to transfer cases under section 1404(a).

The Coordinating Committee for Multiple Litigation, which drafted section 1407, was initially appointed by Chief Justice Warren to deal with the hundreds of *Electrical Equipment* antitrust cases that flooded the federal courts in the early 1960s. *See* H. Rep. No. 1130, 1968 U.S.C.C.A.N. at 1899; S. Rep. No. 454, at 3-4; *see generally* C. Bane, *The Electrical Equipment Conspiracies* (1973); P. Neal & P. Goldberg, *The Electrical Equipment Antitrust Cases: Novel Judicial Administration*, 50 A.B.A.J. 621 (1964). Chaired by Chief Judge Alfred P. Murrah of the Tenth Circuit, the Committee developed a program of nationwide pretrial coordination for these cases, including a uniform pretrial discovery schedule, master pretrial orders, a central document depository, and a series of transfers under section 1404. *See* H. Rep. No. 1130, 1968 U.S.C.C.A.N. at 1899; *Hearings on H.R. 8276 Before Subcomm. No. 5 of the Comm. on the Judiciary*, 89th Cong., 2d Sess., Serial No. 21, at 21-22.

As a result of the success of the Murrah Committee, the Judicial Conference authorized the Committee to study possible statutory changes needed to facilitate future coordination efforts. At the March 1965 meeting of the Judicial Conference, the Committee presented its draft of section 1407, which Congress ultimately enacted without material change. Report of the Proceedings of the Judicial Conference of the United States, March 18-19, 1965, at 12. The Murrah Committee's accompanying report stressed that the judge designated to preside over pretrial proceedings would have the power to conduct all such proceedings: "Under proposed § 1407 the transferee district court would have the usual powers provided by the Federal Rules of Civil Procedure, including authority to render summary judgment, to control and limit pre-trial proceedings, and to impose sanctions for failure to make discovery or comply with pre-trial orders." Report of the Co-Ordinating Committee on Multiple Litigation Recommending New Section 1407, Title 28, *reprinted in*

Plumbing Fixture Cases, 298 F. Supp. 499, *and in Hearings on H.R. 8276 Before Subcomm. No. 5 of the Comm. on the Judiciary*, 89th Cong., 2d Sess., Serial No. 21, at 24. The Murrah Committee further stressed that its proposed legislation would preserve the power of the transferee district court to order transfers for trial under section 1404(a), during or at the close of "pretrial proceedings":

> This statute affects only the pre-trial stages in multi-district litigation. It would not affect the place of trial in any case or exclude transfer under other statutes (e.g., Title 28, U.S.C. §§ 1404(a) and 1406(a)) *prior to or at the conclusion of pre-trial proceedings*.

Id. (emphasis added).[15]

The Judicial Conference approved the bill and it was sent to Congress, where the key witnesses at House and Senate hearings were Judge Murrah, other members of his Committee, and the Committee's executive secretary. *See, e.g., Hearings on S. 3815 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess., at 51-59 (statement and testimony of Chief Judge Alfred P. Murrah); *id.* at 4-7 (statement and testimony of Judge Edwin A. Robson); *id.* at 15-25 (statement and testimony of Judge William H. Becker); *Hearings on H.R. 8276 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 89th Cong., 2d Sess., Serial No. 21, at 26-36 (statement and testimony of Judge William H. Becker). At those hearings, the executive secretary made clear the role played by section 1404

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[15] The dissent below argued that this language "indicated that a venue transfer would only be available before or after, but not while, the case was in the MDL court." J.A. 79 n.21; *see also* Pet. Br. 23 n.7. That argument simply misreads the report. It assumes that the phrases "prior to" and "at the conclusion of" both modify "pretrial proceedings." But it makes no sense to suppose that the Committee intended to say that trial transfers may occur before or after pretrial proceedings. Pretrial proceedings begin with the filing of the complaint and end with the commencement of trial. All section 1404 orders occur *during* pretrial proceedings. What the Murrah Committee said was that section 1404 transfers may occur "prior to" or "at" the *conclusion* of pretrial proceedings — that is, at any time prior to trial.

transfers in coordinating the *Electrical Equipment* cases and testified that although section 1407 was concerned only with pretrial coordination, it could be used in conjunction with section 1404(a) to accomplish trial coordination as well:

> [Section 1407] provides that such a transfer shall take place under the provisions of this bill for the pretrial phases of the litigation, leaving the place of trial where the action began *or in some other district to which the action might conceivably be transferred under the existing provisions of section 1404(a).*

Id. at 23 (emphasis added).[16]

Section 1407 passed the Senate without any opposition on August 9, 1967, substantially as written by the Murrah Committee. 113 Cong. Rec. 22,123-24 (1967); *see* H. Rep. No. 1130, 1968 U.S.C.C.A.N. at 1898. The House then passed the measure on a voice vote, after incorporating two amendments proposed by the Justice Department that are not relevant to this case. 114 Cong. Rec. 4,924-28 (1968). The Senate agreed to the House amendments, 114 Cong. Rec. 9,657 (1968), and President Johnson signed section 1407 into law on April 29, 1968.

On May 31, 1968, pursuant to the authority vested in him by the newly enacted section 1407, the Chief Justice appointed seven judges to the first MDL Panel. The first Chairman of the Panel was Chief Judge Murrah, who was joined by two other members of the Murrah Committee — Judges Edwin A. Robson and William H. Becker. The remaining Panel members were Judges John Minor Wisdom, Edward Weinfeld, Joseph S. Lord, III, and Stanley A. Weigel. *See*

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[16] That sections 1407 and 1404(a) could be used in tandem to accomplish both coordinated pretrial and trial proceedings likewise was not lost on the bill's opponents, who complained during congressional hearings that "if the authority given by [proposed section 1407] and by § 1404 were combined, the transfer for discovery could well become a transfer for trial." *Hearings on S. 3815 Before the Subcomm. on Improvements in Judicial Machinery of the Comm. on the Judiciary*, 89th Cong., 2d Sess., at 97 (objection of Phillip Price). Despite that objection, Congress passed the bill.

C. Peterson & J. McDermott, *Multidistrict Litigation: New Forms of Judicial Administration*, 56 A.B.A.J. 737, 740 (1970). Within months, the MDL Panel promulgated a detailed set of rules of procedure pursuant to the rulemaking authority conferred by section 1407(f). Included in that first set of substantive rules was MDL Rule 15(b), which expressly confirmed the power of MDL transferee judges to order section 1404(a) trial transfers to their own districts in the course of conducting "pretrial proceedings" under section 1407:

> (b) Actions will be remanded to the district from which they were transferred unless an order has been signed by the designated *transferee Judge transferring an action to another district under 28 U.S.C. § 1404(a)* or 28 U.S.C. § 1406(a). Such actions will be remanded by the Panel to the district designated in the Section 1404(a) or Section 1406(a) order.

47 F.R.D. 377, 381-82 (1969) (emphasis added). That rule is identical in all material respects to current MDL Rule 14(b).[17]

The foregoing history, culminating in the promulgation of a rule directly addressing the question presented in this case, demonstrates that Congress never intended to prohibit consideration of section 1404 motions in the months or years during which cases might be consolidated for pretrial proceedings under section 1407. *See, e.g., Morse v. Republican Party*, 116 S. Ct. 1186, 1200-03 (1996) (referring to legislative history and to "history that led to passage" of the Act at issue); *Reno v. Koray*, 515 U.S. 50, 59 (1995) (referring to provision's "context and history"). Indeed, as Judge Sneed correctly noted in the majority opinion below, this Court's decisions *require* a presumption, "absent compelling evidence to the contrary, that the rules promulgated pursuant to section 1407(f) are 'not inconsistent with Acts of Congress.'" J.A. 41 n.7; *see id. at* 42 (citing

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[17] Current MDL Rule 14(b) provides in pertinent part that MDL actions shall be remanded by the Panel to the transferor district for trial, "unless ordered transferred by the transferee judge to the transferee or other district under 28 U.S.C. 1404(a) or 28 U.S.C. 1406. In the event that the transferee judge so transfers an action under 28 U.S.C. § 1404(a) or 1406, no further action of the Panel shall be necessary to authorize further proceedings including trial."

United States v. American Trucking Ass'n, 310 U.S. 534, 549 (1940)).

This Court frequently has emphasized the need for deference to administrative interpretations of statutes. *See Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843-44 (1984); *American Trucking*, 310 U.S. at 549. In *American Trucking*, the Court held that deference to an agency's interpretation of a statute is especially appropriate when the agency itself "suggested the provisions' enactment to Congress" and rendered a "contemporaneous construction." 310 U.S. at 549; *see Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 414 (1993) (citations omitted) ("we generally will defer to a permissible interpretation espoused by the agency entrusted with [the statute's] implementation" and "[o]f particular relevance is the agency's contemporaneous construction which 'we have allowed to carry the day against doubts that might exist from a reading of the bare words of the statute'"); *Davis v. United States*, 495 U.S. 472, 484 (1990) ("we give an agency's interpretation and practices considerable weight where they involve the contemporaneous construction of a statute and where they have been in long use"); *Andrus v. Shell Oil Co.*, 446 U.S. 657, 668 (1980) (citations omitted) (administrative practice "'has peculiar weight [because] it involves a contemporaneous construction of [the] statute by the men charged with the responsibility of setting its machinery in motion'" and is "strong support" for construction of statute). Those principles plainly apply here.

The dissent below argued that the MDL Rules merit no deference because they are not the product of formal rulemaking under the Rules Enabling Act or the Administrative Procedure Act. J.A. 76. But it is well established that the *Chevron* principle applies outside the context of formal administrative actions by executive agencies. *See Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979) (regulations of Council on Environmental Quality interpreting NEPA entitled to "substantial deference"); *McMillan Park Comm. v. National Capital Planning Comm'n*, 968 F.2d 1283, 1287-88 (D.C. Cir. 1992) (deferring to the Advisory Council on Historic Preservation); *Texas Rural Legal Aid, Inc. v. Legal Servs. Corp.*, 940 F.2d 685, 689-90 (D.C. Cir. 1991) (deferring to the Legal Services Corporation); *see also United States v. LaBonte*, 117 S. Ct. 1673, 1686-87 (1997)

(Breyer, J., joined by Stevens and Ginsburg, JJ., addressing in dissent an issue the Court expressly declined to decide) (arguing for *Chevron* deference to Sentencing Commission's construction of statute it administers). In view of the MDL Panel's actual participation in the drafting and passage of section 1407, and the fact that the Panel consists of seven experienced federal judges appointed by the Chief Justice, this case would be a strange place to begin making exceptions to the deference principle.

C. Section 1407(h).

Congress' addition, in 1976, of a new subsection (h) to section 1407 is a further indication that Congress never understood section 1407(a) as barring section 1404 transfers by MDL transferee courts, and that Congress in fact acquiesced in that established procedure. Although petitioners argue that the 1976 amendment supports their position, precisely the opposite is true.

In section 1407(h), Congress extended the MDL Panel's section 1407 transfer power to encompass the power to transfer, for purposes of both pretrial *and* trial proceedings, a category of *parens patriae* cases brought by State Attorneys General under the antitrust laws. Petitioners suggest that this amendment would not have been necessary if Congress had interpreted pre-amendment section 1407 as allowing trial transfers under section 1404(a). Pet. Br. 15. But petitioners' line of argument ignores a fundamental difference between the operation of section 1404(a) and section 1407(h): Although section 1404(a) restricts transfers to judicial districts "where [the action] might have been brought," section 1407(h) authorizes the MDL Panel to transfer *parens patriae* actions to *any* judicial district, without regard to personal jurisdiction or venue requirements that might otherwise apply. *See* E. Olliff, *Parens Patriae Antitrust Actions for Treble Damages*, 14 Harv. J. Legis. 328, 353 n.149 (1977) ("[u]nder section [1407(h)], the frustrating requirement that venue must have been originally proper in the transferee district for an action to be tried there . . . has been abolished for *parens patriae* actions"); *see also In re New Mexico Natural Gas Antitrust Litig.*, 482 F. Supp. 333, 336 (J.P.M.L. 1979) (fact that all defendants are not subject to suit in transferee district does not prevent transfer for

pretrial proceedings). In addition, petitioners' argument ignores the fact that section 1407(h) conferred, for the first time, authority to order trial transfers *by the MDL Panel itself.*[18]

In truth, rather than supporting petitioners' contentions, Congress' 1976 addition of subsection (h) shows that Congress never intended section 1407 to foreclose section 1404(a) trial transfers by MDL transferee judges. That is revealed by the introductory clause of section 1407(h), in which Congress took care to identify in explicit terms any provisions of law that might be construed as limiting the broad trial transfer power that Congress was conferring on the Panel for the first time. Section 1407(h) provides:

> *Notwithstanding the provisions of section 1404 or subsection (f) of this section,* the judicial panel on multidistrict litigation may consolidate and transfer with or without the consent of the parties, for both pretrial purposes and for trial, any action brought under section 4C of the Clayton Act.[19]

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[18] *Amicus* University of California ignores that same distinction in attempting to derive significance from Congress' failure to enact proposed amendments to section 1407 that would have authorized trial transfers by the Panel in mass disaster cases. U.C. *Amicus* Br. 9-10. *Amicus* also fails to disclose other aspects of the proposed legislation that Congress might well have considered more objectionable than expanding section 1407 — such as the provision that would have extended federal jurisdiction by requiring only minimum diversity in mass disaster cases. *See* H. Rep. 102-1085, at 117-18 (1992). That same minimum diversity feature appeared in the failed 1988 legislation cited by *amicus* Washington Legal Foundation (W.L.F. *Amicus* Br. 10) — a point that *amicus* likewise fails to disclose. *See* H. Rep. No. 100-889, at 10 (1988).

Petitioners' *amici* advance other contentions not made by petitioners in this Court or below, including novel constitutional arguments irrelevant to this case. Because those contentions have not been preserved or presented by petitioners, they obviously are not before the Court. *See DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 195 n.2 (1989); *United Parcel Serv. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981).

[19] The legislative history does not illuminate the precise intent underlying the introductory clause of section 1407(h), but the plain language of that clause makes it reasonably clear that Congress conferred trial transfer power "[n]otwithstanding . . . section 1404 " because section 1404(a) provides that transfers can be only to districts "where [the action] might have been brought." Similarly, Congress conferred trial transfer power on the MDL Panel "[n]otwithstanding . . . subsection (f)," which authorizes the promulgation of the Panel's rules of procedure, because those rules provided at the time of the amendment that transfers for trial must be made in accordance with the venue and personal jurisdiction limitations set forth in sections 1404 and 1406. *See* Rule 11(b), 65 F.R.D. 253, 261 (1975) (MDL Rule in effect at time of passage of section 1407(h)). Because the whole point of section 1407(h) was to allow the MDL Panel to order transfers for both pretrial and trial purposes without regard to personal jurisdiction and venue requirements, Congress conferred that transfer power "notwithstanding" the foregoing provisions of law.

Thus, in the introductory clause of section 1407(h), Congress identified what it considered to be potential impediments to the trial transfer authority it was conferring, but in doing so, Congress did not identify section 1407(a). That is significant because under petitioners' theory of the case, the "shall be remanded" clause of section 1407(a) would have appeared to Congress to pose a far more formidable barrier to trial transfers by the MDL Panel than sections 1404 and 1407(f), the two provisions of law that Congress did identify in section 1407(h). For example, although section 1404(a) merely limits the number of available judicial districts to which a case may be transferred for trial, the "shall be remanded" clause of section 1407(a) requires, according to petitioners, that *all* cases transferred by the Panel be remanded to their original districts for trial. As the plain language of subsection (h) reveals, however, petitioners' reading of the "shall be remanded" clause cannot possibly be correct: If Congress had shared petitioners' view that section 1407(a) absolutely bars transfers of cases for trial, then the expansive power conferred by section 1407(h) not only would have been "[n]otwithstanding the provisions of section 1404 and subsection (f)," but also "[n]otwithstanding subsection (a) of this section." Given that subsection (a) is the provision of section 1407 that defines the basic jurisdiction of the MDL Panel, Congress surely would have looked there first in 1976 when it was identifying potential impediments to the trial transfer authority that it was about to confer on the MDL Panel.

The introductory clause of section 1407(h) is significant in this case not only for what it does not say, but also for what it does say — *i.e.*, its explicit reference to section 1404. That reference evinces Congress' awareness in 1976 of the interrelationship between sections 1407 and 1404, which was by then well-established in MDL practice. When Congress was considering whether to extend the MDL Panel's section 1407 power to transfer cases without regard for personal jurisdiction and venue limitations to include the power to transfer *parens patriae* cases for trial, Congress certainly would have been aware that transferee courts were universally viewed as having the power to order trial transfers under section 1404(a) to districts in which the cases might have been brought.[20]

It follows that this is an especially appropriate case to invoke the principle that Congress is presumed to be aware of a consistent and longstanding interpretation of an existing statute when Congress amends that statute. *See, e.g., Keene Corp. v. United States*, 508 U.S. 200, 210-14 (1993); *Lindahl v. OPM*, 470 U.S. 768, 781-86 (1985). If Congress had disagreed with the MDL Panel's existing rules, which authorized transferee courts to exercise the same transfer authority that every federal district court had exercised since section 1404 was enacted in 1948, Congress could have legislated to the contrary. Because it failed to do so, while simultaneously enacting a new subsection with an introductory clause that accepts the prevailing interpretation, Congress acquiesced in the MDL rule and in the line of judicial decisions uniformly holding that section 1407 poses no barrier to section 1404(a) transfers by MDL transferee judges. *See*

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[20] By 1976, there was substantial case law on this issue. *See, e.g., Pfizer*, 447 F.2d at 125; *CBS Color Tube*, 342 F. Supp. at 1405. Indeed, the principle that section 1407(a) does not foreclose section 1404(a) transfers was so firmly established by then that the procedure was memorialized in the MDL Panel's rules and in the *Manual for Complex Litigation*. *See* MDL Rule 15(b), 47 F.R.D. 377, 381-82 (1969); MDL Rule 11(b), 65 F.R.D. 253, 261 (1975) (similar rule in effect when Congress enacted section 1407(h)); *Manual for Complex Litigation* § 5.22, at 78 & n.227 (CCH ed. 1973) (citing *Pfizer* for the proposition that "Section 1404(a) and Section 1407 are not mutually exclusive remedies but are cumulative, and may both be employed in respect to a given case").

Franklin v. Gwinnett County Pub. Schools, 503 U.S. 60, 72-73 (1992); *see also id.* at 78 (Scalia, J., concurring) ("The Rehabilitation Act Amendments . . . must be read, in my view, not only 'as a validation of *Cannon*'s holding,' . . . but also as an implicit acknowledgment that damages are available.").

D. Common Sense.

Finally, construing section 1407 as authorizing trial transfers by MDL judges makes a great deal of sense. Section 1404(a), by its own terms, applies to "any civil action" — categorical language that this Court has stated means just what it says. *See Collett*, 337 U.S. at 58. Petitioners' interpretation of section 1407 would render section 1404(a) all but a dead letter in a common situation in which trial transfers are particularly likely to be desirable — when multiple related actions are pending in various districts and already have been consolidated for pretrial proceedings. It is well established that the transferor court loses jurisdiction to enter orders in a case once it has been transferred by the MDL Panel. *See, e.g., Korean Air Lines*, 829 F.2d at 1178 (D. H. Ginsburg & Williams, JJ., concurring) (confirming that transferor court has no jurisdiction to enter any orders during the pendency of any pretrial proceedings in the transferee court); *Glasstech, Inc. v. Ab Kyro Oy*, 769 F.2d 1574, 1576 (Fed. Cir. 1985) (same). Thus, petitioners effectively contend that, during the months or years when cases are pending in the transferee court, *no* court would have power to order a trial transfer.

There is no reason to believe that Congress would have intended such a result. As the Second Circuit concluded in *Pfizer*, MDL transferee judges must be able to adjudicate trial transfer motions lest there be a lengthy "gap" during which litigants have no recourse:

> This conclusion would clearly seem to comport with the essential purpose of section 1407 to "promote the just and efficient conduct" of complex multidistrict litigation. Since it is reasonably clear that, subsequent to a section 1407 transfer, and prior to a remand, the transferor court has no authority to entertain a section 1404(a) motion or any other motion, to hold that the transferee court also has no section 1404(a) authority

> would mean that all proceedings on any section 1404(a) motion would have to be suspended for the entire period of pretrial, the cases remanded to a number of different districts, and then each district judge consider separate 1404(a) motions. The inevitable result would be further extensive delay in litigation which already is among the most time consuming to appear on the federal dockets. We see no reason to sanction such a result.

447 F.2d at 125.

Requiring section 1404(a) motions to be held in abeyance until they can be presented to the transferor court on remand, in addition to introducing needless delay, would impair the efforts of transferee courts to bring order out of the chaos of numerous competing lawsuits. It is undeniable that there are many MDL cases in which the most sensible way to resolve the matter would be a trial conducted by the judge who has developed a full understanding of the controversy during months or years of pretrial proceedings.[21] Under petitioners' view of the statute, however, unless most or all of the transferor courts agree with that assessment and send the cases back to the transferee court, the benefits of consolidation for trial will be lost. Those decisions, in turn, will be made by judges who have the *least* knowledge of the litigation, and no knowledge of the "big picture," because they will have had no involvement with the case since entry of the initial consolidation order.

Petitioners seek to dignify that irrational outcome by portraying it, without any support for doing so, as a "carefully crafted legislative

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[21] Petitioners speculate that transferee courts will tend to abuse their power to order trial transfers in cases where they are not justified under the standards of section 1404(a). But the Court should not lightly assume that federal judges are prone to be self-aggrandizing by holding on to cases improperly. Nor should it be surprising that trial transfers are sometimes ordered in MDL cases. Petitioners' unsupported assertions to the contrary notwithstanding, Pet. Br. 20-21 n.6, it is fully legitimate for courts to give weight to the "judicial economy" produced by trying a case where it is already pending, before a court that has become fully familiar with the issues. *See, e.g., Regents of the Univ. of Calif. v. Eli Lilly & Co.*, 1997 WL 405946, at **4-5 (Fed. Cir. July 22, 1997).

compromise." Pet. Br. 19. But rather than supposing that Congress deliberately created a structure bound to produce such anomalous results, it makes far more sense to conclude that Congress understood that section 1404 transfers by transferee courts would be used in conjunction with section 1407 transfers by the MDL Panel. In conferring on the Panel extraordinary authority to consolidate cases without regard to personal jurisdiction and venue limitations, Congress chose not to empower the Panel to transfer cases for trial. But at the same time that it was conferring extraordinary new transfer powers on the MDL Panel, Congress was well aware of the district courts' preexisting statutory authority under section 1404 to transfer cases to districts in which they might have been brought. Inasmuch as the point of section 1407 was to grant new transfer authority to the Panel, not to limit the traditional transfer powers of the district courts, it is reasonable to conclude that Congress intended that the district courts selected to supervise MDL pretrial proceedings would continue to exercise the same section 1404 powers that were available to them in every other case. That reading of congressional intent best effectuates the terms of all the applicable statutory provisions governing transfer, and best advances the goals that lie at the heart of those provisions. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976) (statutes are to be read whenever possible to give effect to all of their terms); *accord Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 115 S. Ct. 2322, 2327 (1995).

The unanimous acceptance of that reading by the federal courts over the past 30 years has been key to the use of MDL proceedings to resolve mass litigation typified by *Lincoln Savings*. There is no reason to change course now.[22]

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[22] The truth of the matter is that prevailing MDL procedures have worked extremely well. Those procedures have been invoked to bring about the just and efficient resolution of literally thousands of cases. As of September 30, 1996, the MDL Panel had centralized 109,410 cases for pretrial proceedings since the advent of section 1407. A total of 57,116 of those cases have been terminated in the transferee courts, 3,757 cases have been remanded for trial, and 48,258 cases remain pending in 43 transferee courts. *See* Administrative Office of the United States Courts, *Judicial Business of the United States Courts, 1996 Report of the Director* 29. Contrary to petitioners' contentions, there is no justification, either in law or in common sense, for altering

II. IN DECIDING THE TRIAL TRANSFER MOTION, THE DISTRICT COURT WAS AUTHORIZED TO SELECT ARIZONA AS THE APPROPRIATE TRIAL VENUE.

The Court also should reject petitioners' fallback argument that the District of Arizona was the one place that Judge Roll could not choose when he ruled on the section 1404(a) motion. Following the dissent's lead, J.A. 68-69, petitioners contend that the language in section 1404(a) stating that a court may transfer an action "to *any other district or division* where it might have been brought" (emphasis added) bars an MDL transferee court from transferring the case for trial to its *own* district. Pet. Br. 19-20. But that argument is not even within the scope of the question presented, which is whether a transferee court may transfer a case to itself "notwithstanding section 1407(a)'s explicit command that every such case 'shall be remanded'" to the transferor district. Pet. Br. i. The proper interpretation of section 1404(a) plainly is not encompassed by that question.

In any event, the argument makes no sense. The most natural reading of the phrase "other district" would be as referring to a district "other" than the district in which the action was filed and otherwise would be tried. Under that reading, the trial transfer in this case was to an "other" district because, absent the transfer order, the trial would have occurred in Illinois.

Under petitioners' alternative construction of section 1404, that provision would have to be read to exclude the possibility of a transfer to the one district most likely to be the optimum forum for trial — the district where the case has been pending during pretrial proceedings. However, petitioners' "strict construction" approach is contrary to this Court's "common-sense approach . . . in interpreting § 1404(a)," *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19, 24-27 (1960); *see also Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 31 (1988) (Congress intended section 1404 motions to be governed by a "flexible and multifaceted analysis"). Thus, for example, this Court has held

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fundamentally the way that the tens of thousands of pending and future MDL actions are to be adjudicated.

that an *appellate* court is empowered to order section 1404(a) transfers to other districts or divisions in certain circumstances, even though the statute provides that only a *district* court has that power. *See Koehring Co. v. Hyde Constr. Co.*, 382 U.S. 362, 365 (1966) ("We do not read 28 U.S.C. § 1404(a), providing that 'a district court may transfer any civil action,' as precluding an appellate court, where unusual circumstances indicate the necessity thereof, from effecting a transfer by direct order."). Given that it is appropriate to read "district court" to mean "appellate court" when it makes sense to do so, as *Koehring* establishes, petitioners' attempt to defeat the transfer in this case by resort to a cramped and nonsensical construction of the "other district" clause necessarily must fail.

III. EVEN IF THE COURT WERE TO CONCLUDE THAT THE TRANSFER DECISION WAS ERRONEOUS, THERE STILL WOULD BE NO BASIS FOR REVERSING THE JUDGMENT BELOW.

Even assuming that section 1407(a) required this case to be remanded to Illinois for trial, the proper result would still be affirmance of the district court's judgment on the merits. That is because: (1) petitioners failed to assert their trial transfer argument in the one forum in which they could have received the relief they sought, the MDL Panel; (2) any conceivable error would be harmless under 28 U.S.C. § 2111 and this Court's recent decision in *Caterpillar*; (3) the sole claim still at issue, a single defamation claim, is facially deficient as a matter of law; and (4) any new rule should be applied only prospectively.[23]

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[23] Thus, this Court either should affirm on any of the foregoing alternative grounds or dismiss the writ in this case as having been improvidently granted. This Court has followed both approaches in similar circumstances. *See Thigpen v. Roberts*, 468 U.S. 27, 29-30 (1984) (affirming on alternative ground); *Goins v. United States*, 306 U.S. 622, 623 (1939) (dismissing writ after briefing and oral argument because error assigned turned out to be nonprejudicial); *see also City of Springfield v. Kibbe*, 480 U.S. 257, 258 (1987) (dismissing writ when contentions were found to have been waived).

A. Petitioners Should Not Now Obtain Relief They Never Sought From The MDL Panel.

Even assuming for the sake of argument that petitioners are correct that a remand became mandatory once pretrial proceedings ended, the only entity that would have been empowered, and dutybound, to order a remand was the MDL Panel. Under the plain language of section 1407, the transferee court is not authorized to order a remand. As petitioners emphasize so often, section 1407(a) directs that MDL cases "shall be remanded *by the panel*." Moreover, under the MDL Rules, the transferee court's sole role is one of making a *suggestion* of remand to the Panel. MDL Rule 14(d). It follows that the appropriate way for petitioners to have sought the relief they wanted was through a motion to the Panel. The Panel's own rules set forth detailed provisions for such a motion. *See id.* Section 1407(e), in turn, provides the exclusive mechanism for seeking judicial review of the Panel's denial of the motion — a petition for a writ of mandamus filed in a court of appeals.

Petitioners never filed such a motion. As a result, the Panel itself never was given the opportunity to address petitioners' challenge to the MDL rule authorizing trial transfers by transferee courts. Moreover, the case never proceeded to the appellate court in the form of a mandamus action in which the Panel was a party and potential participant, as section 1407(e) would have required had petitioners followed proper procedures.

Having failed to follow the proper procedure, petitioners should be barred from raising the remand issue on appeal from a judgment following a full adjudication of the merits. Petitioners cannot attack an alleged violation of law *by the Panel* by appealing from a judgment entered *by the district court*. Under no theory did the district court have a duty to remand the case — because by law it had no power to do so. Petitioners simply ignore reality by suggesting that the district court issued a "ruling on a motion to remand," that the court had no "discretion to *refuse to remand* a case," and that the "district court must adhere to the same statutory limitations as the JPML in *deciding* the remand issue." Pet. Br. 16-17 & n.5 (emphasis added). In fact,

a transferee court does not order or refuse to order a remand; it decides only whether to make a suggestion to the Panel.

Congress has seen fit to vest in the Panel — composed of seven experienced federal judges appointed by the Chief Justice of the United States — exclusive authority to order section 1407 transfers and remands and to promulgate MDL rules of procedure. Petitioners' end-run around the Panel not only subverted the Panel's authority, but also prevented the Panel from bringing its expert judgment to bear on petitioners' facial attack on one of its own rules. Petitioners' decision to bypass the Panel also evaded section 1407(e), which states that review of Panel transfer and remand decisions can be sought *only* through a mandamus proceeding. Apparently, petitioners preferred to retain the option of raising the remand issue on appeal from a final judgment, and knew that this option would be foreclosed if they went to the Panel before trial, lost, and then failed to win relief in an immediate mandamus action. But as Judge Sneed concluded for the court of appeals, that stratagem should not be allowed to succeed: petitioners' failure "to seek succor from the one source that easily could have granted it" forecloses petitioners from now seeking it elsewhere. J.A. 43-44.

It is no answer for petitioners to say that the "proper practice" is to request a suggestion of remand from the district court "in the first instance." Pet. Br. 17 n.5. Petitioners took the first step under MDL Rule 14(d) by asking the district court for a suggestion of remand. But they never took the next step — filing a motion for a remand with the Panel. Petitioners thus made a deliberate choice not to seek relief from the only tribunal authorized under section 1407(a) to order a remand, the MDL Panel.

Nor is it an answer that, by the time of trial, the district court had entered its trial transfer order under section 1404(a). Under petitioners' legal theory, that order was ineffective and void because of section 1407(a), which they say imposed on the Panel a continuing duty to remand the case to the district court in which it was filed. If petitioners were correct, nothing about the section 1404(a) transfer order would have prevented the Panel from ordering a remand, or relieved the Panel of the duty to do so. Petitioners cannot

simultaneously attack the section 1404(a) order as lawless and use it as an excuse for failing to seek relief from the one tribunal that could have granted it under the plain language of section 1407(a) — the MDL Panel.

B. Any Error With Respect To The Trial Transfer Would Be Harmless Error That Could Not Affect The Result In This Court.

It would be particularly inappropriate to allow petitioners to assert the remand claim now as a basis for overturning the judgment below for a second reason: Not only did petitioners fail to seek relief from the MDL Panel before trial, but they have failed to point to any aspect of the district court proceedings suggesting that they received anything less than a full and fair consideration of their claims. Under 28 U.S.C. § 2111, the Court is required to address and decide this issue. Section 2111 expressly provides that "[o]n the hearing of any appeal or writ of certiorari in any case, the court *shall* give judgment after an examination of the record *without regard to errors or defects which do not affect the substantial rights of the parties*." *Id.* (emphasis added); *see* Fed. R. Civ. P. 61. Petitioners have not even suggested any error affecting their "substantial rights." It follows that section 2111 mandates affirmance.

The harmless error analysis is particularly straightforward in this case because it does not require *any* "examination of the record." Petitioners have never complained of any error in the conduct of the trial itself. In the Ninth Circuit, they attacked the trial verdict solely on the basis of the supposedly erroneous trial transfer order. Moreover, petitioners have never contended, let alone established, that they were legally prejudiced by the fact that the trial occurred in Tucson rather than Chicago.[24]

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[24] Petitioners complain in their statement of background facts that there was "much popular feeling" against Charles Keating in Arizona (Pet. Br. 9), but that assertion of indirect prejudice is not one that petitioners made, let alone supported, in any of their court of appeals filings. The "popular feeling" theory is a creation of the dissenting judge below, who referred to it in his second (but not his first) opinion in this case. J.A. 74. The dissent cited no evidence of record to support the theory that there was any "popular feeling" against Keating in Tucson, much less that it was so much greater in Tucson than it was in Chicago that it might have influenced the outcome with respect to third parties like petitioners. In fact, there is not a scintilla of support in the record for the "popular feeling" theory.

The only question, therefore, is whether the district court's section 1404(a) trial transfer order, assuming it was erroneous, is the type of order that by its very nature affects "substantial rights." Petitioners seek to make this point by citing cases in which statutory venue did not exist. *See* Pet. Br. 32 (citing *Olberding v. Illinois Cent. R.R.*, 346 U.S. 338 (1953); *Schnell v. Peter Eckrich & Sons, Inc.*, 365 U.S. 260 (1961); *Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979)). In so doing, they blur the distinction between (1) trial in a district lacking venue and (2) trial after a case has been erroneously transferred under section 1404(a) to a district in which venue was proper — that is, a district "where it might have been brought."

Petitioners seek to leave the impression that the locus of the trial in this case fell within the first category — that is, a district "lacking venue." That suggestion is plainly incorrect. There is no doubt that the District of Arizona had proper venue to try this case, because virtually all of the underlying events took place there. See 28 U.S.C. § 1391(a)(2) (venue exists where "a substantial part" of the underlying events occurred). That fact alone renders inapposite the improper venue cases cited by petitioners.

Instead, petitioners' claimed right to a remand is analogous to a claim of improper transfer to a proper venue. That is not a basis for reversal after judgmen following an error-free trial. Plaintiffs' right of choice among permissible fora is only a conditional right that frequently gives way in appropriate circumstances, as the very existence of sections 1404(a) and 1407 establishes.[25] To our

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[25] Indeed, this Court has held that new statutes concerning venue and transfer — statutes that clearly can have a direct impact on plaintiffs' choice of forum — may be applied retroactively to cases pending at the time of the statute's enactments because those statutes are "wholly procedural." *Denver & Rio*

knowledge, *no* court ever has reversed a judgment on the merits based on an erroneous transfer when, as in this case: (1) trial proceedings took place in a district where the action could have been brought originally (that is, where statutory venue requirements were satisfied), and (2) no showing of actual prejudice was advanced, let alone established. After all, ordering reversal in that circumstance would give the losing litigant a second bite at the apple, without any reason to believe that justice was not done in the first trial. *See Magnetic Eng'g & Mfg. v. Dings Mfg. Co.*, 178 F.2d 866, 869 (2d Cir. 1950) ("[u]pon an appeal from a final judgment against it, it will be difficult for the plaintiff to show that it lost the case because of the handicap of the transfer"); *Filmline (Cross-Country) Prod., Inc. v. United Artists Corp.*, 865 F.2d 513, 520 (2d Cir. 1989) (citations omitted) ("'[s]hould [the movant] finally lose on the merits below, any error in the interlocutory order'" denying a change of venue probably would not constitute reversible error because the movant "'could hardly show that a different result would have been reached had the suit been transferred'");15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3855, at 472-74 (2d ed. 1986) ("The [section 1404(a)] order can be reviewed on appeal from a final judgment in the action, although it is very unlikely to constitute reversible error at that stage of the case").

Indeed, this Court recently confirmed that when a plaintiff receives an adjudication free of error and prejudice in a federal court having jurisdiction and statutory venue at the time of judgment — as petitioners unquestionably did — considerations of finality, efficiency, and economy override any error in a prior refusal to order a remand to plaintiff's chosen forum. In *Caterpillar, Inc. v. Lewis*, 117 S. Ct. 467 (1996), a defendant removed a state court case to federal court purportedly on the basis of diversity of citizenship. However, because the district court indisputably did not have subject matter jurisdiction, plaintiff moved for a remand. In the face of the clear statutory mandate that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the

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Grande Western R.R. v. Brotherhood of R.R. Trainmen, 387 U.S. 556, 563 (1967); *Collett*, 337 U.S. at 71.

case *shall be remanded*," 28 U.S.C. § 1447(c) (emphasis added), the district court refused to order a remand. The court then proceeded to supervise pretrial proceedings despite lacking subject matter jurisdiction to do so. Eventually, certain parties settled and dropped out of the case. As a result, diversity jurisdiction did exist at the time of trial and the entry of judgment in favor of defendant.

On appeal, plaintiff argued that he was entitled to another trial because he had been erroneously denied his right to choose the forum and because the mandate of section 1447(c), that the case "shall be remanded" if jurisdiction is lacking "at any time," was violated. Despite the undisputed fact that the district court did not have subject matter jurisdiction at the time the remand motion was made, and the fact that the case could never have been validly removed to federal court because the deadline for doing so ran long before there was complete diversity among the parties, this Court held that plaintiff's contentions were overshadowed by "considerations of finality, efficiency, and economy":

> These arguments are hardly meritless, but they run up against an overriding consideration. Once a diversity case has been tried in federal court, with rules of decision supplied by state law under the regime of *Erie* . . . , considerations of finality, efficiency, and economy become overwhelming. . . . To wipe out the adjudication post-judgment, and return to state court a case now satisfying all federal jurisdictional requirements, would impose an exorbitant cost on our dual court system, a cost incompatible with the fair and unprotracted administration of justice.

Id. at 476-77.

Those considerations dictate the same result in this case. Like the plaintiff in *Caterpillar*, petitioners complain that their initial choice of forum was frustrated and that the governing law requires that their lawsuit "shall be remanded" to the forum in which the case was filed. Nonetheless, as in *Caterpillar*, any purported error in that ruling is overcome by "considerations of finality, efficiency, and economy" that arise from the final judgment in this case, which was

entered in a court of competent jurisdiction after full discovery and an error- and prejudice-free jury trial.

Indeed, that conclusion applies with even greater force in this case. Unlike the district court in *Caterpillar*, which lacked subject matter jurisdiction for much of the time the case was pending in federal court, the district court in this case had jurisdiction and venue to hear the case at all times. Only the plaintiffs' choice of forum is at issue. Moreover, in *Caterpillar*, the limits on removal from state court that had been raised as a basis for overturning a merits judgment were premised on fundamental principles of federalism and comity — considerations far weightier than the right of choice among the permissible *federal* fora at issue in this case. Finally, unlike the *Caterpillar* plaintiff, petitioners have not suggested any differences in the way the lawsuit would have proceeded had it been litigated in the Northern District of Illinois rather than in the District of Arizona. *See* 117 S. Ct. at 176 n.14 (citing differences between fora raised by plaintiff). Because "[n]othing but a waste of time and resources would be engendered by remanding to the District Court or by forcing the[] parties to begin anew," the decision below must be affirmed. *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 838 (1989).

C. The Single Claim That Survived For Trial Should Have Been Dismissed As A Matter Of Law During Pretrial Proceedings.

The decision below should be affirmed for one more reason: the trial transfer issue should never have arisen because the sole claim that survived for trial — the defamation claim — should have been dismissed during pretrial proceedings.[26] That claim was based upon a single sentence in a letter written by one of the respondents to the editor of *The National Law Journal*, in response to an earlier story in the same publication. The sentence stated: "Lexecon's motion for

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[26] Although the legal insufficiency of petitioners' defamation claim was raised in the court of appeals as an alternative ground for affirmance, the court did not reach the issue. Nonetheless, this Court can and should do so. *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 346-53 (1986) (affirming on alternative ground); *Thigpen*, 468 U.S. at 29-30 (same).

summary judgment also was denied by Judge Richard M. Bilby in a published opinion that details its wrongful activities on behalf of convicted felon Charles H. Keating, Jr.'s American Continental Corp. and Lincoln Savings & Loan in fraudulent dealings with federal regulators." Pet. App. 71(a). The letter then provided the precise citation to Judge Bilby's published opinion. *Id.* Because the respondent did not use the word "alleged" in referring to the wrongful activities detailed in Judge Bilby's published summary judgment decision, the district court believed that a fact question existed concerning whether the respondent had defamed Lexecon. Pet. App. 69-73a.

That defamation claim should have been dismissed as a matter of law under this Court's decision in *Time, Inc. v. Pape*, 401 U.S. 279 (1971), and its progeny. In *Pape*, this Court reversed a libel judgment against *Time* magazine, which had run a story about a government commission's report concerning civil rights abuses by police officers. This Court held that even though the report made clear that the description of the incident was drawn from allegations in a civil complaint, the article's failure to use the word "alleged" in summarizing those allegations could not give rise to liability. *Id.* at 290. For the same reason, the defamation claim in this case should never have survived for trial. The judgment below should therefore be affirmed.

D. Any New Rule Regarding Transfer Should Be Applied Only Prospectively.

Even if this Court were to overturn MDL Rule 14(b) and 30 years of unanimous precedent, which recognize the power of MDL transferee courts to transfer cases under section 1404(a), that decision should be applied only prospectively. Such a decision would establish a new rule of law. Moreover, prospective application of that new rule would not retard its operation, and retroactive application of the new rule would produce substantial inequitable results to the parties here and to those in numerous other MDL actions. *See Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971); *see also Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993).

IV. PETITIONERS' ATTEMPT TO SECURE RELIEF BEYOND THE SCOPE OF THE QUESTION PRESENTED SHOULD BE REJECTED.

The question presented for review is limited to whether the district court had authority to "transfer the case to itself for *purposes of trial*" (emphasis added). Because the defamation claim discussed above is the sole claim that survived for trial, it is the only claim that could be affected by a reversal. All other claims were rejected prior to trial, on a motion to dismiss or a motion for summary judgment, and there is no substantial argument about the district court's authority to issue those pretrial rulings. Moreover, with regard to the district court's rulings on the motions to dismiss, they were affirmed on appeal by the court of appeals, and this Court declined to grant further review. With regard to the district court's summary judgment rulings, petitioners did not challenge their correctness on appeal.

Petitioners nonetheless appear to suggest that there is more at stake than a retrial of the defamation claim — that is, that the district court's summary judgment ruling may have been improper because there purportedly were no "consolidated" proceedings ongoing at the time of that ruling. *See* Pet. Br. 32 (asking that the Court "vacate all district court orders after the conclusion of consolidated pretrial proceedings"). But even if that issue were properly before the Court, which it is not, the challenged transfer order was entered *after* the district court ruled on the summary judgment motions. Moreover, the transferee court's authority to rule on dispositive motions does not evaporate at some metaphysical point in time when "consolidated pretrial proceedings" are deemed concluded. It is cut off only when the MDL Panel remands the case to another court. That never occurred, given that petitioners never asked the MDL Panel to enter such an order.

Consequently, petitioners' attempt to expand the relief fairly encompassed by the question presented for review should be rejected. The only issue left open is the one on which this Court granted review — the transfer "for purposes of trial." Thus, in the event that the transfer order is reversed and further proceedings are required, those

proceedings properly would be confined to the sole defamation claim that survived for trial.

* * *

Although they purport to champion the "plain language" of section 1407(a), the reality is that petitioners ask this Court to rewrite or ignore the plain language of section 1407(a), section 1407(b), section 1407(e), section 1404(a), and section 2111. Thus, petitioners can prevail on the transfer issue only if this Court rewrites section 1407(a) to provide that MDL cases that have not been terminated "shall be remanded *by the transferee court*" rather than "by the panel." Similarly, petitioners ask this Court to rewrite section 1407(b) to refer to "pretrial proceedings *except for motions to transfer under section 1404(a)*" and to rewrite section 1404(a) to authorize a "district court *other than an MDL transferee court*" to transfer "any civil action *other than an action previously transferred under section 1407.*" They further ask the Court to overlook their failure to go to the Panel, and section 1407(e)'s mandate that Panel orders be reviewed only through mandamus proceedings. Finally, petitioners ask this Court to ignore section 2111's express mandate that this Court "shall" give judgment without regard to errors that are harmless. In fact, however, the plain language of the governing statutes cannot be ignored. Nor is there any reason for this Court to depart from almost 30 years of settled precedent or to disrupt the effective functioning of established multidistrict practice.

CONCLUSION

The writ of certiorari should be dismissed as improvidently granted or the judgment below should be affirmed.

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Dated: August 18, 1997

APPENDIX

The multidistrict litigation statute, 28 U.S.C. §§ 1407(a), (b), (e), (f), and (h), provides in pertinent part:

(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however,* That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any such claims before the remainder of the action is remanded.

(b) Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation. For this purpose, upon request of the panel, a circuit judge or a district judge may be designated and assigned temporarily for service in the transferee district by the Chief Justice of the United States or the chief judge of the circuit, as may be required, in accordance with the provisions of chapter 13 of this title. With the consent of the transferee district court, such actions may be assigned by the panel to a judge or judges of such district.

. . . .

(e) No proceedings for review of any order of the panel may be permitted except by extraordinary writ pursuant to the provisions of title 28, section 1651, United States Code.

. . . .

(f) The panel may prescribe rules for the conduct of its business not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure.

. . . .

(h) Notwithstanding the provisions of section 1404 or subsection (f) of this section, the judicial panel on multidistrict litigation may consolidate and transfer with or without the consent of the parties, for both pretrial purposes and for trial, any action brought under section 4C of the Clayton Act.

The federal transfer statute, 28 U.S.C. § 1404(a), provides:

For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

Supreme Court, U.S.
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No. 96-1482

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

LEXECON INC., *et al.*,
Petitioners,
v.
MILBERG WEISS BERSHAD HYNES & LERACH, A PARTNERSHIP, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR THE PETITIONERS

Respondents are fighting a losing battle with the text of the federal transfer statutes. Section 1407(a) states that *every* case —"[e]ach action"—subject to a multidistrict transfer "shall be remanded" at or before the conclusion of coordinated pretrial proceedings unless it has been "terminated." But respondents contend that many live actions *need not be remanded at all.* Similarly, *both* section 1407(a) and section 1407(b) confirm that multidistrict transferee courts have only the limited power to conduct "coordinated or consolidated pretrial proceedings." But respondents argue that those courts may bootstrap their circumscribed authority into a boundless license to preside over *all* proceedings, including trial. Finally, section 1404(a) states that a district court may transfer a case to any "*other* district." But respondents assert that a district court may properly "transfer" a case to *itself*.

Respondents, like the Ninth Circuit before them, have offered no plausible way of plugging these gaping holes in their statutory argument. To harmonize their desired result with the plain language of section 1407(a), respondents are reduced to claiming that a transferee court's decision to "transfer" a case to itself for all purposes is actually a "termination" of the "action," so that the mandatory remand requirement does not apply. Milberg Br. 23. But a "transfer" is utterly inconsistent with a "termination." When an action is terminated, there is nothing left to transfer. Conversely, when an action is transferred it remains very much alive; indeed, the only reason to transfer an action is that it has *not* been terminated. The evident failure of respondents' argument on this point—their only attempt to give meaning to section 1407(a)'s mandatory remand language—is itself a sufficient basis to reject their understanding of the statute.

Respondents fare no better in their discussion of sections 1407(b) and 1404(a). They ignore clear statutory language; they disregard unequivocal evidence of legislative intent; and their policy analysis is nothing more than

an attempt to secure a result that Congress rejected both when it passed section 1407 and when it declined to adopt numerous later proposals to amend it to cover all proceedings, including trial.

Given the weakness of their merits contentions, respondents are left recycling the same grab-bag of non-merits arguments that they advanced in opposing certiorari. There is no reason to revisit these matters now. In any event, respondents' arguments are without merit and provide no bar to the Court's deciding the important and recurring legal issue squarely presented here.[1]

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[1] Lexecon will not burden the Court's consideration of the purely legal issues before it with correction of all of Milberg's distortions of the underlying dispute. A few points are worth noting, however. First, this case is not an attempt to relitigate *Lincoln Savings*; five of the six counts in Lexecon's complaint have nothing to do with the resolution of that matter. CR 127, Amended Complaint. Moreover, Milberg's allegations are false: the Lexecon reports at issue in *Lincoln Savings* were truthful and accurate, and no judge or jury has ever decided otherwise. Indeed, the very regulators who received those reports—and who Milberg claims that Lexecon defrauded—have continued to hire Lexecon and Professor Fischel in savings and loan cases, long after the Lincoln Savings collapse and, in fact, *attempted to retain Lexecon as the government's expert in the Lincoln Savings trial itself*. CR 697 at 30, Test. of D. Fischel. Finally, Milberg's reliance on Judge Bilby's later recollection of the conclusion of the *Lincoln Savings* case is misplaced; at the time of Lexecon's dismissal, the court-approved notice informed the class action plaintiffs that Lexecon was a "non-settling defendant" that paid no consideration for its dismissal. *See* CR 18, Exh. F. Lexecon voluntarily returned the $700,000 it had received in fees from Lincoln Savings months *after* it was dismissed from that case and not in any way as a *quid pro quo* for the dismissal. Any reliance on Judge Bilby's extra-judicial statements would be particularly unwarranted in light of his decision to recuse himself from any future participation precisely because, as he saw it, he could not fairly evaluate the merits of Lexecon's case. *See* J.A. 74 & n.16 (Kozinski, J., dissenting) (finding it "troubling" that the majority relied on Judge Bilby's views "in characterizing Lexecon's case").

I. CONGRESS EXPRESSLY CONFINED MULTIDISTRICT TRANSFERS TO "COORDINATED OR CONSOLIDATED PRETRIAL PROCEEDINGS" AND DIRECTED THAT "EACH ACTION" "SHALL BE REMANDED" AT OR BEFORE THE CLOSE OF THOSE PROCEEDINGS.

A. The Language of Both Section 1407 and Section 1404 Defeats Respondents' Argument.

1. Congress enacted a straightforward, coherent, and carefully limited scheme for the conduct of multidistrict litigation. The Judicial Panel on Multidistrict Litigation ("JPML" or "panel") may transfer cases only for "coordinated or consolidated pretrial proceedings." 28 U.S.C. § 1407(a). The transferee court, in turn, is empowered to oversee only "[s]uch coordinated or consolidated pretrial proceedings." *Id.* § 1407(b). No later than the end of those coordinated proceedings, the JPML must return the case to the district originally chosen by the plaintiff. Congress provided only a single explicit exception to this otherwise categorical requirement: "*Each action* so transferred *shall be remanded* by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred *unless it shall have been previously terminated*." *Id.* § 1407(a) (emphasis added).

Respondents would tear this scheme apart at the seams. Under their theory, since section 1407(a) requires only the panel, not the transferee court, to order such remands, transferee courts are free to ignore that statutory limitation entirely. *See* Milberg Br. 15-20. According to respondents, the only constraint on "self-transfer" comes not from section 1407, but rather from section 1404(a), which authorizes all-purpose transfers only to those courts where the case "might have been brought."

That analysis is plainly wrong. The multidistrict litigation statute, like all laws, must be read to " 'give effect, if possible, to every clause and word' " that Congress enacted. *Bennett v. Spear*, 117 S. Ct. 1154, 1166 (1997) (quoting *United States v. Menasche*, 348 U.S. 528, 538

(1955)). An interpretation that " 'emasculate[s] an entire section' " of the law fails that basic test. *Id.* (quoting *Menasche*, *supra*); *Colautti v. Franklin*, 439 U.S. 379, 392 (1979) (it is an "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative").

Congress said that "[e]ach action . . . shall be remanded." That provision—written in language as "clear as sunlight" (J.A. 57 (Kozinski, J., dissenting))—must be given effect. Thus, regardless of whether the remand requirement is addressed directly to transferee courts, those courts may not act in a way that short-circuits the JPML's unqualified duty to return to plaintiff's chosen forum *every live section 1407 case*—not just those in which, by happenstance, transfer under section 1404 may not be available.[2]

Even respondents seem to recognize that the statute must be understood in a way that gives effect to Congress's mandate that all these actions "shall be remanded" unless they have been "terminated." Thus, after initially seeking to evade that requirement entirely, respondents ultimately argue that when a transferee court "transfers" a case to itself (or to another court), the "action" has actually been "terminated" for purposes of section 1407. Milberg Br. 23. But that theory makes nonsense of the statutory language. The JPML's own rules explain that an action is "terminated," not upon transfer to another venue, but upon entry of a "valid judgment, including but not limited to summary judgment, judgment of dismissal and judgment upon stipulation." JPML Rule 14(a). And, in ordinary English, an action is "terminated" when it is

[2] Indeed, if it were true, as respondents argue, that the remand requirement applies only to the JPML, and has no effect where cases are not voluntarily returned by the transferee court, there would have been no need for Congress to specify that the remand requirement does not apply when cases are "terminated." Cases that are terminated, like cases that are self-transferred, never even return to the JPML. Thus, respondents' argument—aside from undermining the "shall be remanded" language—renders the phrase "unless . . . previously terminated" mere surplusage.

"br[ought] to an ending or cessation"; by contrast, an action is "transferred" when it is "carr[ied] or take[n] from one person or place to another." *Webster's Third New International Dictionary* 2359, 2426-27 (1993). Indeed, only an action that has *not* been terminated is even a candidate for transfer. In the end, therefore, respondents cannot avoid the fact that self-transfer renders the "explicit" and "mandatory" language of section 1407(a) a dead letter. Brief of Charles Alan Wright as *Amicus Curiae* 4-5 (Apr. 11, 1997). For that reason alone, their arguments should be rejected.

Nor can respondents draw any comfort from section 1407(b). Contrary to their assertion, that provision explicitly *confirms* that a multidistrict transferee court's authority to oversee a case is *coextensive* with—not greater than—the power of the JPML to transfer the case.

The language of section 1407(b)—"[s]uch coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation"—tracks that of section 1407(a) precisely. The reference to "[*s*]*uch* coordinated or consolidated pretrial proceedings" is plainly a reference to the limited proceedings for which transfer is authorized in subsection (a) and at or before the conclusion of which a remand is required under subsection (a). Thus, subsection (b) by its own terms *explicitly* forecloses the argument that a transferee court may unilaterally convert its limited authority over a subset of pretrial proceedings into the power to control the venue of the entire case. Congress confined the scope and duration of a transferee court's power by allowing transfer "*only* for pretrial purposes." *In re Korean Air Lines Disaster*, 829 F.2d 1171, 1174 (D.C. Cir. 1987) (R.B. Ginsburg, J.) (emphasis added), *aff'd on other grounds*, *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989).

That straightforward understanding of section 1407(b), moreover, is the *only* interpretation of that provision that is compatible with the statute as a whole. Section 1407(b)

must be harmonized with section 1407(a). *See, e.g., Conroy v. Aniskoff*, 507 U.S. 511, 515 (1993) (emphasizing "that a statute is to be read as a whole") (internal quotation omitted); *Beecham v. United States*, 511 U.S. 368, 372 (1993) ("the plain meaning that we seek to discern is the plain meaning of the whole statute").

If a transferee court is limited to overseeing coordinated pretrial proceedings, sections 1407(a) and (b) dovetail perfectly. At the moment that a transferee court loses its authority to rule under subsection (b), subsection (a)'s mandatory remand requirement kicks in. On the other hand, if a transferee court could arrogate to itself the power to control all proceedings, including trial, the mandatory remand requirement of section 1407(a) could be subverted entirely—the JPML would never fulfill its obligation to remand the case "to the district from which it was transferred." Self-transfer, accordingly, "sets Congress's carefully crafted plan for multidistrict litigation on its head." Blake M. Rhodes, *The Judicial Panel on Multidistrict Litigation: Time for Rethinking*, 140 U. Pa. L. Rev. 711, 734 (1991).

The clash between respondents' argument and section 1407's scheme is put in sharp relief by section 1407(h). That provision explicitly allows the JPML to transfer cases "for both pretrial purposes *and* for trial." 28 U.S.C. § 1407(h) (emphasis added). That text is significant not only because it establishes that Congress knows how to authorize multidistrict transfers for trial when it so desires (*see Amicus* Br. of Charles Alan Wright 5-6), but also because it demonstrates that, when Congress has done so, it has made the *JPML*, not individual transferee courts, the arbiter of whether a broader transfer is warranted.

If, as Milberg claims (Br. 34), Congress intended to give individual transferee courts the power to decide whether to keep cases for trial, section 1407(h) would have vested *those courts* with that authority, and simply made clear that the transferee court could retain these cases notwithstanding any limitations in section 1404. Yet section 1407(h) does no such thing. That further demonstrates that Congress did not intend individual transferee courts to make ad hoc determinations as to the extent of their own authority over multidistrict cases.[3]

2. Even if we were wrong on all these points, however, respondents *still* could not prevail. That is because the only provision that respondents cite as authority for self-transfer—28 U.S.C. § 1404(a)—does not authorize that practice.[4] As explained in our opening brief, that provision states that "a district court may transfer any civil action to any *other* district or division"; it does not allow a court to engage in the oxymoronic practice of "transferring" an action to *itself*.[5]

Like the Ninth Circuit, respondents make no serious attempt to counter this argument. Instead, they simply

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[3] The fact, emphasized by respondents (Milberg Br. 32-33), that Congress did not expressly state that the authority in section 1407(h) existed "notwithstanding section 1407(a)" is of no import. Congress explicitly allowed section 1407(h) transfers for trial. In light of that clear language, there would be no need to state that a provision mandating remand before trial was no longer applicable to the specific subset of cases covered by 1407(h).

[4] Respondents' assertion that the section 1404 issue is not before the Court is flatly wrong. The question presented here squarely frames the issue of whether a court "may transfer [a] case to itself." Pet. i. It is well-settled that such an express reference to an issue satisfies the Court's requirements—*i.e.*, that petitioners need not draft long, unreadable questions that cite to "book and verse" for every contention they raise. *Eddings v. Oklahoma*, 455 U.S. 104, 114 n.9 (1982). Indeed, a contrary rule would hardly serve the Court's interests. *Cf.* S. Ct. R. 14.1(a) (question presented should be "short"). In any case, there can be no serious dispute that the section 1404(a) issue—which was addressed in detail in the petition itself (at 2-3, 12-13, 19) *and* in Milberg's opposition (at 11, 17-18) —is "fairly included" within the question presented here (S. Ct. R. 14.1(a)) and that all parties could reasonably expect it to be part of the merits briefing in this matter.

[5] Moreover, as our opening brief explained, and respondents make no effort to refute, even if section 1404 could be read to permit self-transfer, such a general provision could not overcome the specific congressional scheme for multidistrict litigation set forth in section 1407. *See Crawford Fitting Co. v. Gibbons, Inc.*, 482 U.S. 437, 445 (1987); *Morales v. TWA*, 504 U.S. 374, 384 (1992).

assert—without ever parsing the relevant statutory language—that the phrase "other district" refers to "a district 'other' than the district in which the action was filed and otherwise would be tried." Milberg Br. 38. But this reading is plainly untenable when section 1404(a) is read in full. That provision, entitled "Change of Venue," states: "For the convenience of parties and witnesses, in the interest of justice, *a district court* may transfer any civil action *to any other district or division* where it might have been brought" (emphasis added). The only interpretation of that language that makes any linguistic sense is that the "other district" that may receive a case stands in contrast to the "district court" that "may transfer" it. *See* J.A. 69 & n.9 (Kozinski, J., dissenting).[6] Indeed, a district court is not "transferring" an action (or "changing" the venue) in any meaningful sense when it uses section 1404 to retain a case for trial. Rather, as Judge Kozinski explained, " '[i]t is simply proclaiming jurisdiction over the case.' " J.A. 69 (quoting Rhodes, *supra*, 140 U. Pa. L. Rev. at 740).

Finally, respondents hazard no response to our showing that the Arizona district court did not, in any event, even purport to apply the well-established statutory standards for section 1404 transfers. *See* Pet. Br. 29-30 & n.12; J.A. 72 (Kozinski, J., dissenting) ("[a]pplying normal 1404(a) standards, a venue transfer of this case . . . would never have been granted").[7]

[6] There is no substance to the contention that our understanding of section 1407 renders section 1404 a "dead letter" by creating a "gap" during which no such motions may be considered. Milberg Br. 35-36. While consolidated pretrial proceedings are still active and appropriate, *there is no reason* to transfer a case. And when those proceedings end or cease to be productive, the case must be remanded to the transferor court, which is fully empowered to consider an all-purpose section 1404 transfer.

[7] There is no basis for affording *Chevron* deference to the JPML's understanding of the federal transfer statutes. *Compare* Milberg Br. 30-31. As an initial matter, the statutory language here is clear, so deference would not be warranted in any circumstances. Beyond this, the *Chevron* rule, which is grounded in respect for the congressionally delegated administrative authority of Executive Branch agencies, provides no basis for this Court to defer to the views of lower federal court judges as to the meaning of a law governing the courts that this Court supervises—especially when those lower court judges' views were subject to no public review or comment. In any event, under no theory does the JPML administer *section 1404(a)*—and, as explained above, the district court's misreading of that provision is a wholly sufficient reason to reverse the Ninth Circuit's judgment.

B. Respondents' Legislative History Arguments Ignore the Detailed Evidence of Congress's Intent.

Our opening brief detailed the abundant evidence demonstrating that the Ninth Circuit's approval of self-transfer is inconsistent not only with the text of sections 1407 and 1404, but also with the relevant legislative history. Pet. Br. 21-24. The federal judges who proposed the statute told Congress that it "would not affect the place of trial in any case" and thus would achieve "efficien[cy] and econom[y] . . . without losing the benefits of local trials in the appropriate districts." *In re Plumbing Fixture Cases*, 298 F. Supp. 484, 499 (J.P.M.L. 1968) (reprinting report). The relevant House Report stated unequivocally that section 1407(a) "*requires* that transferred cases be remanded." H.R. Rep. No. 90-1130 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1898, 1901 (emphasis added). Indeed, that Report went so far as to state that Congress would have to enact "amendments" to authorize "consolidation and coordination for trial purposes." *Id.* at 1902.[8]

By contrast, respondents cannot unearth a single statement by a Member of Congress—or even a member of the judicial committee that proposed the bill—endorsing

[8] Respondents assert, without any support, that the Report's language about the need for statutory amendments to allow for trial consolidation was meant to refer only to the JPML. Pet. 25 n.14. But the Report broadly states that "amendments" would be necessary to allow for "consolidation and coordination for trial purposes." 1968 U.S.C.C.A.N. at 1902. Nothing in that statement suggests that a transferee court would be free to order such consolidation without any statutory amendments.

their theory that a *transferee* court can use section 1404(a) to transfer a case to itself and thereby avoid the statutory remand requirement.[9]

With nothing to point to in support of their position, respondents resort to putting their own spin on a few ambiguous statements about the possibility of section 1404 transfers. Milberg Br. 25-28. But those statements are uniformly consistent with the understanding that *transferor* courts could use section 1404 transfers as an alternative to, or in conjunction with, section 1407. Indeed, that is the *only* reading of these remarks that is plausible in light of the explicit statements recounted in our opening brief, including the House Report's unequivocal declaration that section 1407 "require[s]" remand. Pet. Br. 21-24.

Nor do respondents gain anything by relying on the post-enactment actions of the members of the judicial committee who ultimately became members of the JPML. The relevant question, for purposes of the legislative history, is not what these judges did with the legislation after it was passed, but what they told Congress about the legislation before it was passed. Notably, respondents never quote any of those judges' actual statements to Congress. That is understandable, because those individuals nowhere suggested that a transferee court could keep a case for trial proceedings. To the contrary, Judge Becker, the only judge who directly addressed the question, said exactly the opposite:

> Unless disposed of during the pretrial proceedings in the transferee court, the transferred actions *must be remanded* to the transferor court at or before the conclusion of the pretrial proceedings, as provided in paragraph (a).

Hearings on S. 3815 and S. 159 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess. 21 (1967) (emphasis added). Judge Becker, moreover, further stressed that, since cases in which section 1404 transfers are desirable are already "dealt with satisfactorily," "these cases *were excepted from* [*the bill*]." *Id.* at 16-17 (emphasis added).

There is, in short, no basis in the testimony or the report of these judges from which to infer that Congress expected its direct language of command—that "[e]ach action . . . shall be remanded"—to be transformed into a meaningless suggestion that "each action shall be remanded unless the transferee court decides it should not be."

C. Respondents' "Common Sense" Policy Argument Is Directly Contrary to Congress's Own Explicit Policy Choice.

Respondents make no attempt to explain how the use of self-transfer in *this* case led to any efficiencies—indeed, they are unable to point to *any* coordinated proceedings in this action. Nevertheless, they argue that, in general, "common sense" supports approval of this practice. As they see the issue, transferee courts—or at least those courts that happen to be appropriate venues under section 1404—must be able to retain cases for trial in order to "bring order out of the chaos of numerous competing lawsuits." Milberg Br. 36. Respondents' argument is seconded, unsurprisingly, by a variety of *amici* representing the interests of *defendants* in multidistrict litigation—entities such as the American Insurance Association, the Aerospace Industries Association, and several major banks.

Congress, however, had other concerns in mind when it enacted section 1407, and it struck a very different balance. As explained in our opening brief (at 21-24,

[9] Respondents do cite the prepared statement of a private citizen (Phillip Price) who testified at a congressional hearing. *See* Milberg Br. 28 n.16. But they neglect to mention that when the *same citizen* expressed that view in his live testimony to the Committee, Senator Tydings quickly explained that the statute as drafted would *not* allow the case to be retained after the conclusion of coordinated pretrial proceedings. Indeed, it was precisely Senator Tydings's unequivocal retort to Mr. Price that we quoted in our opening brief. *See* Pet. Br. 22.

29-31), both the text of the statute and its legislative history demonstrate that Congress made a considered judgment to limit multidistrict transfers in order to preserve *plaintiffs'* forum selection prerogatives as well as the benefits of local trials. Congress further recognized that, in many instances, trial in the transferee forum is in fact inefficient. *See* 1968 U.S.C.C.A.N. at 1901 ("from the standpoint of the courts it may be impracticable to have all cases in mass litigation tried in one district"). Although Congress has been urged repeatedly to reach a different policy conclusion—to authorize multidistrict transfers for trial—it has uniformly declined to do so (except in the section 1407(h) context). *See* H.R. 2450, 102d Cong., 1st Sess. § 4 (1991); H.R. 3406, 101st Cong., 1st Sess. § 4 (1989); H.R. 4807, 100th Cong., 2d Sess. § 303 (1988).[10]

Respondents, and the repeat-player defendants who support them, should not be able to achieve by judicial interpretation what Congress has refused to grant through legislation. *See United States v. Noland*, 116 S. Ct. 1524, 1528 (1996) (courts may "not take it upon themselves" to make a determination that Congress "could have, but did not, make"). Accordingly, even if respondents' efficiency-based arguments were wholly persuasive, this Court would still be bound by the legislative judgment evinced by the plain text of section 1407 and its equally unambiguous legislative history. *See Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231, 2252 (1997).

In fact, however, joint multidistrict trials raise difficult policy problems—especially from a plaintiff's perspective. Multidistrict plaintiffs frequently suffer the inconvenience of traveling for trial to a distant city with a potentially hostile jury pool; they also often lose their opportunity to control their own cases and to craft arguments that will best advance their individual claims. *See* Richard L. Marcus, *Confronting the Consolidation Conundrum*, 1995 BYU L. Rev. 879, 890, 893. Plaintiffs with stronger cases are lumped together for trial with those with weaker ones, and all plaintiffs are forced to endure the kind of lengthy, complex trials that make it much more difficult for a jury to understand their evidence. *See* Joan Steinman, *Reverse Removal*, 78 Iowa L. Rev. 1029, 1043-44 (1993).

[10] Congress considered these amendments precisely because it understood that the present statute does not permit coordination beyond pretrial proceedings. *See* H.R. Rep. No. 102-373 at 7 (1991) ("Under the present rules, cases . . . may be consolidated for purposes of pretrial proceedings but then are returned to the district court from which they came."); H.R. Rep. No. 100-889, at 41 (1988) ("Transfer is currently authorized for pre-trial proceedings only.") (quoting Department of Justice analysis); 129 Cong. Rec. 28313 (1983) (Rep. Kastenmeier) ("once the pretrial phase is completed, the transferee court must return the individual cases to their respective original district courts . . . . there is currently no mechanism for the consolidation of the trials themselves").

Moreover, even in cases where consolidation for trial might be fair and efficient, section 1404(a) would still be an ill-suited tool for effecting such transfers. As respondents acknowledge, section 1404(a) permits a transfer only to a court in which every one of the consolidated multidistrict cases "might have been brought." Only by happenstance, therefore, would an all-purpose transfer be available to the transferee court. Section 1404(a) thus hardly provides a rational mechanism for achieving the ends that respondents seek.

In sum, as Professors Wright *and* Miller have jointly—and correctly—explained, while commenting on this very case, since "surely Judge Kozinski is right that the statutory foundations" for self-transfer are "shaky," the reasonable way to address this issue is through a "revision to Section 1407." 15 Wright, Miller & Cooper, *Federal Practice & Procedure* § 3867, at 119 (1997 Supp.). The American Law Institute has also recommended that section 1407 be amended to allow for consolidation for trial *—though only with careful safeguards. See* American Law Inst., *Complex Litigation: Statutory Recommendations and Analysis* § 3.01, at 38 (1994) (enumerating new criteria and safeguards to be considered in trans-

ferring multidistrict matters for trial). If consolidation for trial is to be authorized, it should be through considered congressional review of such detailed proposals, not through a jerry-rigged, ad hoc scheme that presses the general transfer statute into service in a context for which it was never designed.

II. RESPONDENTS HAVE OFFERED NO TENABLE REASON NOT TO ADDRESS THE PURE QUESTION OF LAW SQUARELY PRESENTED BY THIS CASE.

When Lexecon sought certiorari on the self-transfer issue, respondents argued that this case did not squarely present that issue because Lexecon had waived its argument and because, in any event, any error was harmless. Milberg Opp. 20-26. Lexecon's reply brief explained (at 4-8) why those arguments lacked merit, and the Court granted certiorari. Although respondents now rehash the very same claims, there is no reason for the Court to consider them again. *See United States v. Williams*, 504 U.S. 36, 39 (1992) (refusing to consider waiver argument rejected at certiorari stage; given the Court's scarce resources, any other course of action "would be improvident indeed"). Even if the Court decides to look at these matters again, however, respondents' claims have not improved with age.

a. Respondents' first contention—that Lexecon somehow failed to preserve its objection to the self-transfer by not petitioning the JPML directly—represents an abrupt and opportunistic about-face. When Lexecon sought mandamus in the Ninth Circuit to challenge the Arizona court's self-transfer order and compel the court to relinquish the case, respondents did *not* argue that Lexecon's only recourse was to petition the JPML. To the contrary, they argued that mandamus was inappropriate because Lexecon had a complete remedy on appeal from final judgment: "[*T*]*here is no question* that Lexecon can seek review of the order changing venue following final

judgment." [11] The Ninth Circuit accepted that argument in denying mandamus (J.A. 23), and respondents should not be heard to assert a contrary proposition now.

Beyond procedural fairness, Lexecon had no window of opportunity in which to bring this issue to the JPML. In accord with JPML Rule 14(d), Lexecon brought the remand issue initially to the transferee court, the body best equipped to decide whether consolidated pretrial proceedings had ended. When that court, after a second request by Lexecon, finally ruled on the remand issue, it simultaneously transferred the case to itself—which, under JPML Rule 14(b), deprived the panel of all authority over this matter. Lexecon then sought relief through the only available means, first on mandamus and then—*following the very course of action urged both by respondents and by the Ninth Circuit mandamus panel*—on appeal after final judgment.

Under these circumstances, any attempt to fault Lexecon for not "seeking succor" from the JPML is indeed a "sucker-punch." J.A. 59 n.1 (Kozinski, J., dissenting). Lexecon was not required to defy the JPML's rules—and seek relief from a body that denied it had any authority—in order to preserve its claim, particularly in light of respondents' (and the Ninth Circuit's) directly contrary statement that the issue could be addressed after final judgment.

Moreover, the Arizona court did not simply refuse to refer the case to the JPML for remand; it *also* transferred the case to itself under section 1404(a). It was that self-transfer ruling that allowed the court to retain the case for trial in violation of section 1404 as well as section 1407. Since respondents do not—and cannot—claim that the self-transfer ruling should have been reviewed by the JPML, it was clearly proper for Lexecon to seek review on appeal in the Ninth Circuit and then before this Court.

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[11] Milberg Defendants' Response in Opposition to Petitioners' Motion for a Stay of District Court Proceedings Pending a Decision on their Petition for Writ of Mandamus 3 (9th Cir. June 9, 1995) (emphasis added; internal quotation omitted).

Finally, and in any event, there is no dispute that the Ninth Circuit actually decided the issue Lexecon presents here. That alone provides a solid basis for the Court to decide the question presented, regardless of any claim of prior procedural error. *See, e.g., Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991); *Stevens v. Department of the Treasury*, 500 U.S. 1, 8 (1991).

b. Milberg's attempt to divert this Court from correcting the systematic misreading of the federal transfer statutes by the Ninth Circuit and countless other lower courts by invoking harmless error is no more persuasive.

Contrary to respondents' new-found contention that improper venue is a minor matter that cannot be remedied after final judgment, it is well-established that a party's "substantial rights" (28 U.S.C. § 2111) are *always* violated when, as here, its case is decided by a court that lacks the *authority* to rule under the federal venue laws. Absent waiver, a decision by a court that lacks statutory venue is no different than one by a court that lacks statutory jurisdiction; the proper (and only) remedy is reversal of the judgment. *See Olberding v. Illinois Cent. R.R.*, 346 U.S. 338, 340 (1953) (reversing judgment after trial because of improper venue; "unless the defendant has also consented to be sued in that district, he has a right to invoke the protection which Congress has afforded him"); *Schnell v. Peter Eckrich & Sons, Inc.*, 365 U.S. 260, 264 (1961) (rejecting claim that adherence to venue statute "exalts form over substance"); *Sockwell v. Phelps*, 906 F.2d 1096, 1099 (5th Cir. 1990) ("harmless error analysis has no place in a case in which a party has not consented to or waived his challenge to the statutorily improper venue"); *Save Our Cumberland Mountains, Inc. v. Clark*, 725 F.2d 1434, 1437 (D.C. Cir. 1984) ("to find that [a] venue ruling was harmless error would undermine any policies Congress may have sought to promote when it chose to restrict venue").

Indeed, respondents do not even contest that a violation of a statutory venue requirement is reversible error.

Milberg Br. 43. They contend, however, that this case constitutes an exception to that ordinary rule because Lexecon *could* have brought suit in Arizona—*i.e.*, venue would have been proper in Arizona as an initial matter. Even if true, however, that is wholly beside the point. The key fact is that Lexecon, exercising its deeply-rooted right to select the forum, chose not to do so. When the case was sent to Arizona under section 1407, that court had authority to conduct only *coordinated pretrial proceedings*. The court's failure to remand the case after those proceedings had ended and its limited authority had expired was, therefore, unlawful—a violation of statutory venue requirements of precisely the kind that this Court has concluded requires reversal. Moreover, since section 1404(a) does not authorize self-transfer, the district court's judgment must be reversed for violating the requirements of that venue statute as well.[12]

In any event, Milberg's claim that Lexecon suffered no prejudice here blinks reality. Respondents, seeking to avoid a federal judge in Chicago who had rejected their key arguments, dragged Lexecon thousands of miles from home to a forum where "there was much popular feeling against Lincoln Savings, Charles Keating, and those (like [Lexecon]) who were associated with them." J.A. 74 (Kozinski, J., dissenting). No reasonable observer could conclude that Lexecon was not prejudiced by this forum-shopping strategy, especially in light of Milberg's extensive attempts at trial to exploit its unlawfully obtained advantage. *See id.* at 74 n.15 (describing how Milberg's counsel

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[12] Respondents cite dicta in two lower court cases (Milberg Br. 44) questioning whether a party could obtain relief after judgment—rather than on mandamus—where the court had *statutory authority* to transfer the case but was claimed to have abused its discretion in ordering the transfer. That dicta has no relevance here, where the Arizona court had no statutory authority either to maintain jurisdiction after consolidated pretrial proceedings ended or to transfer the case to itself. Moreover, as noted, Lexecon exhausted the mandamus route and was told by the Ninth Circuit (at respondents' urging) to raise the issue on direct appeal.

"peppered his [trial] arguments with references to Charles Keating's misdeeds and [respondents'] attempts to recover money for the victims").

Certainly, respondents' sudden concern for judicial economy rings hollow. They obtained the transfer to an inconvenient forum and to a judge with no familiarity with the case for the ostensible purpose of conducting coordinated pretrial proceedings and then—without any pretense of engaging in such proceedings—fought at every turn to avoid the legally required remand in this case. If they had simply acquiesced in the proper legal outcome in the first place, none of the potential waste that they now decry would have occurred.

c. Finally, *Caterpillar, Inc. v. Lewis*, 117 S. Ct. 467 (1996), does not support respondents' claim. *Caterpillar* had nothing to do with the federal venue statutes, and it did not discuss, much less limit, *Olberding*'s holding that reversal is proper when statutory venue requirements are violated.

Beyond this, the *Caterpillar* Court stressed that allowing the judgment to stand was "in harmony" with relevant congressional policy. 117 S. Ct. at 476. Here, by contrast, the policy at the very heart of section 1407 is to authorize only *limited* transfers in order to safeguard plaintiffs' forum rights *even where* that may result in some inefficiency. To allow this judgment to stand in the name of "finality, efficiency, and economy" (Milberg Br. 45) would thus subvert Congress's core judgment in enacting section 1407.

Moreover, in sharp contrast to *Caterpillar*, there was never any "curing" of the key procedural mistake in this case. *Compare* 117 S. Ct. at 476-77. Nothing that occurred after the Arizona court's improper self-transfer decision rendered that decision proper. Thus, that venue error—which, as noted, is no different than a jurisdictional error in this regard—infected the case throughout. And

it will continue to infect multidistrict cases around the country unless and until this Court acts to correct it.[13]

III. THE APPROPRIATE RELIEF HERE IS TO VINDICATE THE STATUTORY COMMAND THAT MULTIDISTRICT CASES MUST BE REMANDED AT OR BEFORE THE CONCLUSION OF COORDINATED PRETRIAL PROCEEDINGS.

This Court's practice is to decide the legal question raised by a case by announcing a generally applicable rule of law; the lower courts can then apply that rule to the facts of the case. *See, e.g., Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 117 S. Ct. 1040, 1054 (1997); *United States v. Lanier*, 117 S. Ct. 1219, 1228 (1997). There is no need to depart from that salutary practice here. The Court should simply declare that transferee courts lose their authority to rule when consolidated pretrial proceedings end and an appropriate motion asserting the right to remand is made. The consequences of those principles for this case can and should be addressed on remand.[14]

In any event, the proper relief in this case is obvious. Respondents effectively *concede* that no coordinated pre-

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[13] Respondents' other arguments deserve little discussion. This is plainly not an appropriate vehicle to decide how *Time, Inc. v. Pape*, 401 U.S. 279 (1971), would apply to the particular facts at issue here; indeed, that matter was not even addressed by the court of appeals. Nor would it be appropriate for the Court to give its ruling only prospective effect. This Court has been sharply critical of the practice of purely prospective judicial rulemaking. *See Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 94-97 (1993). In any event, respondents make no attempt to explain why this is the kind of truly extraordinary case that could satisfy *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971).

[14] There is no merit to respondents' claim that the Court is somehow barred from following that established course of action here. Milberg Br. 48-49. The question presented in Lexecon's petition stressed that multidistrict transfers are "solely for 'consolidated pretrial proceedings' " (Pet. i), and the petition itself (at 2-3, 16, 17) made plain that Lexecon's legal argument—tracking the plain language of the statute—was that such cases must be remanded "at or before the conclusion of such pretrial proceedings."

trial proceedings ever occurred and that there was no prospect of such proceedings at the time Lexecon made its motion. Accordingly, any rulings made by the district court after that date were outside its statutory authority. *See* J.A. 79 n.22 (Kozinski, J., dissenting) (all orders after August 1994 request for remand "were beyond [the court's] authority" and "should be vacated").[15]

CONCLUSION

The judgment of the Ninth Circuit should be reversed and the matter remanded with instructions to vacate all district court orders after the conclusion of consolidated pretrial proceedings and to return this case to the JPML for remand to the Northern District of Illinois.

Respectfully submitted,

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September 17, 1997

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[15] For that reason, the separate argument of the Cotchett respondents is unavailing. The Arizona court entered a Rule 54(b) judgment as to them in June 1995, a month *after* its order illegally transferred the case to itself. *See* CR 602. That order was thus void, and the case remains open as to them. Moreover, the underlying decision granting summary judgment to those parties was issued in April 1995, nearly a year after any hope of coordinated proceedings had ended and Lexecon had asserted its right to a remand.

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No. 96-1482

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

LEXECON INC., *et al.*,

Petitioners,

v.

MILBERG WEISS BERSHAD HYNES & LERACH, A PARTNERSHIP, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CHARLES ALAN WRIGHT AS *AMICUS CURIAE* SUPPORTING PETITIONER

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April 11, 1997

16 pp

QUESTION PRESENTED

This brief is limited to Question 1 in the Petition for a Writ of Certiorari. That question is as follows:

> Whether a district court, to which a case has been transferred solely for "consolidated pretrial proceedings" under the federal multidistrict litigation statute, 28 U.S.C. § 1407(a), may transfer the case to itself for purposes of trial, notwithstanding section 1407(a)'s explicit command that every such case "shall be remanded" at the conclusion of pretrial proceedings "to the district from which it was transferred."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

NO. 96-1482

LEXECON INC., *et al.*,

Petitioners,

v.

MILBERG WEISS BERSHAD HYNES & LERACH, A PARTNERSHIP, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF CHARLES ALAN WRIGHT AS *AMICUS CURIAE* SUPPORTING PETITIONER

This brief as *amicus curiae* is submitted on behalf of Charles Alan Wright[1] with the written consent of all

---

[1] In accordance with new Rule 37.6, amicus states that he wrote this brief entirely by himself and that no one other than amicus made a monetary contribution to the preparation or submission of the brief.

parties. The letters consenting to the filing of the brief have been filed in the office of the Clerk.

INTEREST OF AMICUS CURIAE

Charles Alan Wright is a member of the Bar of this Court, of the Supreme Courts of Minnesota and Texas, and of many lower federal courts. He holds the William B. Bates Chair for the Administration of Justice at The University of Texas. He has written extensively on the federal courts, including a multivolume Treatise,[2] a Hornbook,[3] and a Casebook.[4] He was Reporter for The American Law Institute's STUDY OF DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1969). From 1961 to 1964 he was a member of the Advisory Committee on Civil Rules. From 1964 to 1976 and again from 1987 to 1993 he was a member of the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.

As a result of a lifetime of teaching and writing about the federal courts and working for their improved administration, amicus has a keen interest in seeing that

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[2] WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE (1969-1997).

[3] WRIGHT, LAW OF FEDERAL COURTS (5th ed. 1994).

[4] MCCORMICK, CHADBOURN & WRIGHT, CASES ON FEDERAL COURTS (9th ed. 1992).

those courts function efficiently. But it is equally important that the lower federal courts function only as Congress has authorized them to do. Unless the court below is reversed, lower federal courts in many cases will feel that they have power to do what the statute does not allow them to do and what Congress knowingly refrained from authorizing them to do.

REASONS FOR GRANTING THE WRIT

The issue here is not a complicated one. Pursuant to 28 U.S.C. § 1407 a case is transferred by the Judicial Panel on Multidistrict Litigation from the district in which it was filed to some other district. The transfer is, as the statute requires, for "coordinated or consolidated pretrial proceedings." When the pretrial proceedings are finished, must the case be transferred back to the district from which it was transferred or may the transferee court transfer the case to itself for trial?

The statute gives an explicit answer. The third sentence of § 1407(a) says, with a proviso not here relevant: "Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated * * *."

Clearly "shall be remanded" is mandatory language. It leaves no room for the transferee court or the panel to exercise discretion whether to remand the

case. Equally clearly, that language was no accident. The legislative history is unambiguous. Congress knew that it was authorizing transfer for pretrial proceedings only and that when those proceedings were ended, the action was to be remanded to the transferor court.[5] The matter is spelled out in words that leave no room for doubt in the report of the House Judiciary Committee on the bill that became § 1407.

> The proposed statute affects only the pretrial stages in multidistrict litigation. It would not affect the place of trial in any case or exclude the possibility of transfer under other Federal statutes.
>
> * * *
>
> The subsection requires that transferred cases be remanded to the originating district at the close of coordinated pretrial proceedings. The bill does not, therefore, include the trial of cases in the consolidated proceedings. The experience

[5] This is, of course, on the amiable fiction that Congress "knows" everything that is in the legislative history of a statute it adopts. A less fictive way of putting the matter would be that the committee of judges who drafted the statute knew exactly what they were and were not authorizing, they intended this result, and they told Congress precisely what it would be doing if it adopted the statutory language they had drafted.

> of the Coordinating Committee was limited to pretrial matters, and the committee consequently considers it desirable to keep the legislative proposal within the confines of that experience. Additionally, trial in the originating district is generally preferable from the standpoint of the parties and witnesses, and from the standpoint of the courts it may be impracticable to have all cases in mass litigation tried in one district. * * *
>
> If proposed section 1407 should be enacted and future experience justifies extending it to include consolidation for trial purposes as well, only minor amendments to the present language of the bill will be necessary.

H.R. Rep. No. 1130, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. 1898, 1900, 1901-1902.

Congress was as good as its word. In 1976, as a part of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Congress added subdivision (h) to § 1407. This allows the multidistrict panel to order that *parens patriae* actions brought by state attorneys general under § 4C of the Clayton Act be transferred for both pretrial purposes and for trial. Act of Sept. 30, 1976, Pub.L. 94-435, Title III, § 303, 90 Stat. 1396. And in 1988 the House of Representatives passed a bill that, among

other things, would have amended § 1407 to provide that in specified multiparty, multiforum cases in which at least 25 persons died or suffered damages of more than $50,000 each, "the transferee district court may, notwithstanding any other provision of this section, retain actions so transferred for the determination of liability." H.R. 4807, § 303, 100th Cong., 2d Sess. (1988). This was passed by the House on September 13, 1988, 134 Cong.Rec. H7443-7455. Those provisions were not included when the bill was passed by the Senate and signed into law. Act of Nov. 19, 1988, Pub.L. 100-702, 102 Stat. 4642.

The court below relied on portions of the legislative history, including a sentence quoted above, in which it was said that § 1407 "would not * * * exclude the possibility of transfer under other Federal statutes." The Ninth Circuit, following the lead of several other courts of appeals, thought that this permitted the transferee court to transfer the case to itself for trial under 28 U.S.C. § 1404(a). In his dissent in the court below Judge Kozinski demonstrates that a self-transfer under § 1404(a) is neither linguistically nor logically possible. (Pet. App. 39a-40a; 102 F.2d at 1544-1545). A 1948 statute cannot be given a meaning it could not have had when it was adopted in order to provide a result under a 1968 statute that Congress specifically considered and expressly rejected. And there was no need for Congress to amend § 1407 in 1976 and for the House of Representatives to approve amending it in 1988 to provide that in specified classes of cases

transfer could be for both pretrial proceedings and trial if this was already possible in all cases under existing § 1407 read in combination with § 1404(a).

Fewer than four percent of the nearly 100,000 cases transferred by the Judicial Panel on Multidistrict Litigation have been sent back for trial to the district in which they were commenced. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 32, 80 (1995). This is not surprising. "These few remands indicate the great success of the transferee judges in terminating by settlement, summary judgment, or other types of dismissal the actions assigned to them by the Panel." Howard, *A Guide to Multidistrict Litigation*, 75 F.R.D. 577, 578 (1977). The mandatory-remand language of § 1407(a) does not apply if the action "shall have been previously terminated." But there are also a significant number of cases in which the transferee court has done exactly what was done here, cases in which the transferee court has retained the case for trial over the objection of at least one of the parties.

Courts that have done this have acted in the teeth of what Congress said in § 1407(a) and what it intended in that statute. The case for doing so is not strengthened, as the Ninth Circuit mistakenly supposed, by the fact that Rule 14(b) of the Judicial Panel allows self-transfer by the transferee court. The Panel's power to make rules is limited to those "not inconsistent with Acts of Congress * * *." 28 U.S.C. § 1407(f). Nor does

it help that a number of other lower courts have allowed self-transfer. If Congress has not given the courts authority to do something, they cannot acquire that authority by adverse possession. The lower federal courts are creatures of Congress and have only the powers that Congress has vested in them. Judge Sirica phrased the matter felicitously:

> Simply stated, Congress may impart as much or as little of the judicial power as it deems appropriate and the Judiciary may not thereafter on its own motion recur to the Article III storehouse for additional jurisdiction. When it comes to jurisdiction of the federal courts, truly, to paraphrase the scripture, the Congress giveth, and the Congress taketh away.

Senate Select Committee on Presidential Campaign Activities v. *Nixon*, 366 F.Supp. 51, 55 (D.D.C.1973).

What was said of jurisdiction is equally true of venue. Venue differs from subject-matter jurisdiction in that it is waivable. But absent waiver, it is as much for Congress to say in which federal court a case shall be tried as it is for it to say whether a case can be heard at all by the lower federal courts. The lower courts that have claimed a power of self-transfer, though the statute forbids it, have been well-intentioned. They have thought, as the court below did, that "[p]ermitting the transferee court to transfer a case to itself upon

completion of its pretrial work often promotes efficiency in the disposition of the case or cases." (Pet. App. 13a; 102 F.3d at 1532). But this does not justify ignoring what Congress has said. "The requirement of venue is specific and unambiguous; it is not one of those vague principles which, in the interest of some overriding policy, is to be given a 'liberal' construction." *Olberding* v. *Illinois Central R. Co.*, 346 U.S. 338, 340 (1953).

This is not a case in which Congress has used ambiguous language. When the 1966 amendment to the general venue statutes allowed suit in "the judicial district * * * in which the claim arose," it used language that was inevitably litigation-breeding. Many lower courts read the statute in a way that allowed plaintiff to bring suit in a district convenient to it. But this Court rebuffed such interpretations of the statute, saying that it was "absolutely clear that Congress did not intend" to give plaintiff a choice that would best suit its convenience. *Leroy* v . *Great Western United Corp.*, 443 U.S. 173, 185 (1979).

Nor is this a case in which Congress has not spoken to an issue and may well not have thought about it. Every circuit except one accepted the concept of "pendent parties" in federal-question cases. But the Court was not swayed by this near-consensus of the lower courts. In the absence of an affirmative grant of pendent-party jurisdiction, it held that the federal courts lacked power to exercise such jurisdiction. *Finley* v. *United States*, 490 U.S. 545 (1989).

It may well be that it would be desirable in mutlidistrict case to allow transferee courts to try the cases as well as conduct pretrial proceedings. The American Law Institute so concluded. COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS § 3.06(a), at 106 (1994). Its recommendation, however, was in the form of proposed legislation for Congress to adopt. Congress itself thought it would be desirable to allow trial in the transferee court with regard to *parens patriae* actions under the Clayton Act, and it amended the statute accordingly. 28 U.S.C. § 1407(h). The House of Representatives thought so in 1988 with regard to mass-disaster litigation, but the Senate did not go along with changing the statute for those cases. See p. 5 above.

This Court should grant certiorari to hear this case. The question of the power of the transferee court is a recurring one in many cases, as is evident from the reported cases in which it has been an issue. But more important even than the resolution of that specific issue is the question of separation of powers that underlies it. The line between those things that the courts can decide for themselves and those on which they may do only those things that Congress has authorized them to do is an important one. It must always be drawn bright and clear.

CONCLUSION

The petition for a writ of certiorari should be granted, at least with regard to Question 1 of the Questions Presented.[6]

Respectfully submitted,
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April 11, 1997

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[6] Amicus expresses no view with regard to Question 2.

No. 96-1482

In the Supreme Court

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LEXECON INC., et al.,
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Respondents.

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE REGENTS OF THE UNIVERSITY OF CALIFORNIA AS *AMICUS CURIAE* SUPPORTING PETITIONER

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BRIEF OF THE REGENTS OF THE UNIVERSITY OF CALIFORNIA AS AMICUS CURIAE SUPPORTING PETITIONER

STATEMENT OF INTEREST

The University of California is one of the world's premier institutions of research and education. It is also an instrumentality of the State of California entitled to sovereign immunity[1] and an occasional litigant in federal court. The University has a two-fold interest in the resolution of this case: (1) it has a vital interest in ensuring that the federal district courts' application of the multidistrict transfer statute does not violate the University's sovereign immunity

[1] *See Regents of the Univ. of California v. Doe*, 117 S. Ct. 900 (1997).

under the Eleventh Amendment of the United States Constitution; (2) it has an interest in ensuring that federal judges do not overstep their authority in applying the laws, even when following a plain statutory command may appear inconvenient or inefficient.

The University's experience with multidistrict transfer in a case now pending before the Federal Circuit tellingly demonstrates how a district court's failure to follow the plain language of section 1407 leads to violation of its Eleventh Amendment rights. In 1990, the University filed suit for patent infringement against Eli Lilly & Co. in the Northern District of California. Lilly sought transfer of the litigation to Indiana, which the California court denied. *Regents of the Univ. of California v. Eli Lilly & Co.*, 734 F. Supp. 911 (N.D. Cal. 1990). In 1992, however, the Judicial Panel on Multidistrict Litigation transferred the action to the Southern District of Indiana for coordinated pretrial proceedings pursuant to 28 U.S.C. § 1407, and the court of appeals for the Federal Circuit denied the University's petition for a writ of mandamus from that order. *In re Regents of the Univ. of California*, 964 F.2d 1128 (Fed. Cir. 1992). In 1994, in response to a motion by Lilly under section 1404(a), the Indiana court transferred the University's suit to itself over the University's objections.

The Indiana court's self-transfer forced the University to trial in Indiana although the University never consented to trial in that jurisdiction. The propriety of the Indiana court's self-transfer is now pending before the Court of Appeals for the Federal Circuit. The University argued that self-transfer by the Indiana court violates both the University's sovereign immunity under the Eleventh Amendment and the plain language of section 1407. The University has also notified the Court of Appeals that this Court granted *certiorari* in this case.

This Court's resolution of the question presented in this case will have a significant impact on the rights of every State and sovereign State entity to select a forum for litigation. This Court has repeatedly emphasized the importance of the Eleventh Amendment in our constitutional framework. Yet, as the University's case against Lilly demonstrates, district courts acting in violation of the plain language of section 1407 have impaired its Eleventh Amendment rights.

The University also has a keen interest in ensuring that judges follow the law. By practicing self-transfer in violation of the plain language of section 1407, courts impermissibly act beyond the scope of their authority. The University litigation, along with the many cases of self-transfer cited in the petition for *certiorari* and by the court below in this case, shows an urgent need for this Court to reaffirm the fundamental principle that federal judges must follow the plain language of the laws passed by Congress.[2]

SUMMARY OF ARGUMENT

Judicial misapplication of sections 1404 and 1407 upsets our constitutional framework two ways. First, it violates the Eleventh Amendment rights of sovereign States. The Eleventh Amendment prevents adverse parties from forcing sovereign State entities to litigate in a federal court unless either the sovereign has consented or Congress has explicitly abrogated sovereign immunity. To enforce rights over which federal courts have exclusive jurisdiction, a sovereign may choose to file suit in a particular federal district court, but this Court's prohibition against implied waivers of Eleventh Amendment immunity prevents sovereigns from then being forced to trial in a different federal jurisdiction by a multidistrict court's self-transfer.

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[2]Written consent to the filing of this brief has been obtained from the parties and is lodged herewith.

Second, in granting motions for self-transfer under section 1404, section 1407 transferee courts overstep the bounds of legitimate statutory interpretation and rewrite the law to suit their own convenience. The doctrine of separation of powers requires judges to follow federal law. While there may be cases where it is difficult to discriminate between legitimate statutory construction and illegitimate legislation in the guise of interpretation, this is not one of them. Section 1407 is unmistakably clear: cases consolidated for pretrial proceedings must be remanded to their originating districts at or before the end of those proceedings. Section 1404 is equally clear in prohibiting self-transfer.

ARGUMENT

I. "SELF-TRANSFER" IS INCONSISTENT WITH ELEVENTH AMENDMENT IMMUNITY.

Eleventh Amendment sovereign immunity provides a jurisdictional limit to the power of the federal courts. For over a century, this Court has "reaffirmed that federal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States.'" *Seminole Tribe v. Florida,* 116 S. Ct. 1114, 1122 (1996) (quoting *Hans v. Louisiana,* 134 U.S. 1, 15 (1890)); *see also Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 98 (1984).

To enforce its patent rights, the University must sue in federal court. 28 U.S.C. § 1338(a). As a sovereign protected by the Eleventh Amendment, the University is entitled to select the forum in which it will proceed to trial:

> [I]ssues of venue are closely related to those concerning sovereign immunity, as this Court has indicated by emphasizing that "[a] State's constitutional interest in immunity encompasses not

> merely *whether* it may be sued, but *where* it may be sued."

Port-Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 307 (1990) (quoting *Pennhurst,* 465 U.S. at 99 (emphasis in original)); *see also Idaho v. Coeur d'Alene Tribe of Idaho,* 65 U.S.L.W. 4540, 4543 (Jun. 23, 1997) ("States have real and vital interests in preferring their own forum in suits brought against them, interests that ought not to be disregarded based upon a waiver presumed in law and contrary to fact").

Self-transfer by section 1407 transferee courts under section 1404 without the consent of litigants entitled to Eleventh Amendment immunity deprives sovereigns of their rights to select a forum for litigation. That practice cannot be squared with this Court's prohibition against implied waivers of Eleventh Amendment rights: "Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here." *Edelman v. Jordan,* 415 U.S. 651, 673 (1974). Because Eleventh Amendment immunity is an "essential component of our constitutional structure," *Dellmuth v. Muth,* 491 U.S. 223, 228 (1989), this Court has long held that a State's waiver of its immunity must be "unequivocally expressed," *Pennhurst,* 465 U.S. at 99, or found by "'such overwhelming implications . . . as [will] leave no room for any other reasonable construction.'" *Edelman,* 415 U.S. at 673 (quoting *Murray v. Wilson Distilling Co.,* 213 U.S. 151, 171 (190[illegible])). Although a State consents to the jurisdiction of the court in which it chooses to bring suit, *Clark v. Barnard,* 108 U.S. 436, 447 (1883) (State's "appearance in a court of the United States would be a voluntary submission to *its* jurisdiction" (emphasis added)), such a waiver must be narrowly construed and cannot be interpreted as a general consent to trial in any venue in the United States.

Judicial misapplication of section 1407 threatens to eliminate sovereigns' Eleventh Amendment rights in many important areas of federal legislation where federal courts have exclusive jurisdiction, including patent, antitrust, securities, and environmental actions. *See, e.g.*, 15 U.S.C. §§ 15(a) (Clayton Act), 78aa (Securities Exchange Act of 1934); 28 U.S.C. § 1338(a) (Patent cases); 42 U.S.C. § 9613(b) (CERCLA). As the House Report on section 1407 notes, such actions are particularly appropriate candidates for consolidated pretrial proceedings. "The types of cases in which massive filings of multidistrict litigation are reasonably likely to occur include not only civil antitrust actions but also, [sic] common disaster (air crash) actions, patent and trademark suits, products liability actions and securities law violation actions, among others." H.R. Rep. No. 1130 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1898, 1900.

To prevent the loss of an immunity that is an essential part of our constitutional scheme and to preserve the States' sovereign rights to select a forum for litigation, cases in which pretrial proceedings are consolidated under section 1407 should be remanded for trial to the originating district, as Congress clearly intended.

II. "SELF-TRANSFER" VIOLATES THE LIMITED POWER OF ARTICLE III JUDGES TO INTERPRET FEDERAL LAWS.

Federal judges play an essential role in interpreting the United States Constitution and federal law, but they cannot overstep the bounds of legitimate interpretation and rewrite laws to suit their own convenience. Judicial overreaching occurs in cases of multidistrict self-transfer.

A. The Separation of Powers Doctrine and the Limited Authority of Article III Judges Require Federal Judges to Follow Clear Statutory Language.

By granting motions for self-transfer of cases consolidated under section 1407 for pretrial proceedings, federal judges disregard a plain statutory mandate. Federal judges, no less than presidents, *see Clinton v. Jones*, 137 L. Ed. 2d 945 (1997); *United States v. Nixon*, 418 U.S. 683 (1974), must comply with the laws passed by Congress, whether those judges disagree with the wisdom, convenience, or efficiency of the law. "'The doctrine of separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power.'" *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 613-14 (1952) (Frankfurter, J., concurring) (quoting *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J.)).

The tripartite structure of our Federal Government prevents federal judges from acting on their own beliefs about the desirability of laws that Congress enacted.

> Our province is to declare what the law is, and not, under the guise of interpretation or under the influence of what may be surmised to be the policy of the Government, so to depart from sound rules of construction as in effect to adjudge that to be law which Congress has not enacted as such.

Dewey v. United States, 178 U.S. 510, 521 (1900) (Harlan, J.). As James Madison explained, "[t]he judges can exercise no executive prerogative, though they are shoots from the executive stock, nor any legislative function, though they may be advised with by the legislative councils." *The Federalist* No. 47, at 326 (James Madison) (Jacob E. Cooke, ed. 1961). The separation of legislative and judicial powers has long been described as essential to prevent the arbitrary application of justice and is deeply embedded in

the philosophical roots of our government's structure: "'Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul, for *the judge* would then be *the legislator*.'" *Id.* (quoting Baron de Montesquieu, emphasis in original).

The requirement that district court judges stay within the boundaries of power prescribed by Congress is particularly acute in matters of jurisdiction and venue. District courts are created by statute, *see* 28 U.S.C. § 132, and have no power except that given by Congress. "[C]ourts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction." *Finley v. United States*, 490 U.S. 545, 547 (1989) (quoting *Ex parte Bollman*, 4 Cranch 75, 93 (1807)); *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850) ("Courts created by statute can have no jurisdiction but such as the statute confers"); *see also* 28 U.S.C. §§ 1330-1368. A district court's ability to conduct coordinated and consolidated pretrial proceedings derives from the power provided by Congress in section 1407. The power to try such cases after the end of those proceedings was withheld from multidistrict transferee courts by the plain language of section 1407.[3]

There may be cases where it is hard to discern the line between legitimate statutory construction and illegitimate

[3]This Court's decision in *Caterpillar, Inc. v. Lewis*, 117 S. Ct. 467 (1996), is consistent with this principle. In *Caterpillar*, the Court refused to vacate a judgment where diversity jurisdiction was lacking early in the proceedings but existed before trial because the nondiverse party had been dismissed. The Court held that when judgment is entered following trial in a case where a jurisdictional defect had been cured, "considerations of finality, efficiency, and economy become overwhelming." *Id.* at 476. In contrast, the court explained that "if, at the end of the day and case, a *jurisdictional* defect remains uncured, the judgment must be vacated." *Id.* at 477. The district court's wrongful transfer in this action was not cured, and under *Caterpillar* the judgment must be vacated.

judicial legislation in the guise of interpretation, but this is not one of them. Self-transfer plainly falls into the latter category. Whether self-transfer promotes efficiency and comports with other federal venue statutes is a matter for Congress, not the Courts, to decide. To date, Congress has chosen not to permit self-transfer.

B. The Plain Language and Legislative History of Section 1407(a) Require That Transferred Multidistrict Cases Be Remanded for Trial.

Congress wrote section 1407 to compel the return of actions transferred for coordinated pretrial proceedings to their originating districts for trial: "Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred." 28 U.S.C. § 1407(a). This decision was deliberate. The House Report to the original section 1407 noted:

> If proposed section 1407 should be enacted and future experience justifies extending it to include consolidation and coordination for trial purposes as well, only minor amendments to the present language of the bill will be necessary.

H.R. Rep. No. 1130, *reprinted in* 1968 U.S.C.C.A.N. 1898, 1902. Congress has amended section 1407, but has never chosen to allow self-transfer. Indeed, a 1991 proposal suggested altering section 1407 to allow trial in the section 1407 transferee court of multidistrict litigation stemming from airline crashes, hotel fires and other similar accidents. H.R. 2450, 102d Cong., 137 Cong. Rec. H 11261-264 (daily ed. Nov. 25, 1991). This proposal passed the House, but was

never acted upon by the Senate. H.R. Rep. No. 102-1085, at 117-18 (1992).[4]

Statutes should be interpreted to "mean what they say." *Barnett Bank of Marion County v. Nelson*, 116 S. Ct. 1103, 1109 (1996). Applying the principle that judges must enforce the law as Congress passed it, this Court in *Finley*, 490 U.S. at 547, rejected an interpretation of the "against the United States" requirement of the Federal Tort Claims Act that departed from the plain statutory language.

> [The FTCA] does not say 'civil actions on claims that include requested relief against the United States,' nor 'civil actions in which there is a claim against the United States,' — formulations one might expect if the presence of a claim against the United States constituted merely a minimum jurisdictional requirement, rather than a definition of the permissible scope of FTCA actions.

Finley, 490 U.S. at 552.

Practical considerations also did not override plain statutory language in *Dewey*, 178 U.S. at 510. There, the Court determined that interpretation of a war-time bounty statute which provided "one hundred dollars, if the enemy's vessel was of inferior force, and two hundred dollars if of equal or superior force," depended solely on the number of ships, not on the presence of "land batteries, mines and torpedoes." *Id.* at 519-20.

> There is undoubtedly force in the suggestion that in rewarding officers and sailors who have sunk or

[4]Nor should this Court interpret Congress' failure to "clarify" the law after courts began to disregard the plain statutory language as an endorsement of the practice of self-transfer. "[W]e have frequently cautioned that 'it is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law.' " *United States v. Steele*, 117 S. Ct. 921, 929-30 (1997) (citations omitted).

> destroyed the enemy's vessels in a naval engagement it is not unreasonable that all the difficulties, of every kind, with which they were actually confronted when engaging the enemy should be taken into consideration. But that was a matter which we cannot suppose was over-looked by Congress; and we are not at liberty to hold that it proceeded upon the broad basis suggested, when it expressly declared that the amount of its bounty shall depend upon the question whether "the enemy's vessel" — not the enemy's vessel and land batteries, mines and torpedoes, by which it was supported — was of inferior or of equal or superior force.

Id. at 520.

So too for section 1407. Had Congress intended self-transfer by section 1407 transferee courts, it would have said so.[5] *See* 15 Wright, Miller & Cooper, *Federal Practice & Procedure*, § 3866, at 620 (2d ed. 1986) ("If the experience in handling multidistrict litigation indicates that maximum efficiency can be obtained by allowing some cases to be transferred for consolidated trial, as well as pretrial management, then the statute should be amended to specifically so provide.").

The plain meaning of section 1407 is reinforced by its purpose as explained in its legislative history. Multidistrict coordination of pretrial proceedings grew out of the federal courts' experience with coordinated discovery in antitrust actions brought against electrical equipment manufacturers

[5]Even the commentaries cited by respondent note that self-transfer was not contemplated by Congress when it enacted § 1407. See Ragazzo, *Transfer and Choice of Federal Law: The Appellate Model*, 93 Mich. L. Rev. 703, 704-05 (1995) (intent of § 1407 to remand cases to originating districts for trial); Marcus, *Confronting the Consolidation Conundrum*, 1995 B.Y.U. L. Rev. 879, 885 (section 1407 transfer was "supposed to be limited to pretrial handling of cases").

in the early 1960s. H.R. Rep. No. 1130, *reprinted in* 1968 U.S.C.C.A.N. 1898, 1899. This practice was limited to matters affecting pretrial depositions and document collection and storage. *Id.* When Congress drafted section 1407, it meant to provide a statutory basis for this type of consolidated pretrial practice. "The purpose of [section 1407] is to furnish statutory authority for the kind of pretrial consolidation and coordination successfully implemented in the electrical cases." *Id.* Congress also explicitly defined "'pretrial proceedings'" as "the practice and procedure which precede the trial of an action. These generally involve deposition and discovery, and, of course, are governed by the Federal Rules of Civil Procedure." *Id.* at 1900.

Congress' requirement that cases transferred for consolidated pretrial proceedings be returned to their originating districts at or before the end of those proceedings must be enforced.

C. Courts Cannot Avoid Their Constitutional Obligation to Follow Section 1407 by Misapplying Section 1404.

Judicial disregard for the clear mandate of section 1407 cannot be justified by a twisted application of section 1404, the general venue transfer statute. Section 1404 provides that: "[f]or the convenience of the parties and witnesses, in the interests of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a).

Self-transfer is not a "transfer . . . to any other district" in any logical or linguistic sense. According to *Webster's,* to "transfer" is "1 a: to convey from one person, place or situation to another: transport; b: to cause to pass from one to another: transmit; . . . 2: to make over the possession or control of: convey; . . . —vi 1: to move to a different place, region, or situation . . ." *Merriam Webster's Collegiate Dictionary* at 1253 (10th ed. 1995). "Other" is defined as "1 a: being the one (as of two or more) remaining or not included . . .; b: being the one or ones distinct from that or those first mentioned or implied . . . ; c: second . . . ; 2: not the same: different." *Id.* at 823.

A section 1407 transferee court acquires possession of the case it receives for pretrial proceedings, albeit with a statutory mandate to remand the case to the originating district court at or before the conclusion of those proceedings. J.P.M.L. Rule 19(a) ("the clerk of the transferor district court shall forward to the clerk of the transferee district court the complete original file"). By retaining the case on a motion to transfer under section 1404, the court is neither affecting a "transfer," nor sending the case to "any other district."

This analysis is not simply an exercise in linguistic formalism. As noted by the dissenting judge below, and as evidenced in the legislative history of section 1407, Congress deliberately chose not to include self-transfer among the procedural options available in multidistrict litigation. Although the House Report on section 1407 acknowledged the availability of transfer motions under section 1404 in cases subject to multidistrict transfer, Congress anticipated that such motions would be brought in the court in which the action was originally filed, as an alternative to pretrial consolidation. "Of course, 28 U.S.C. § 1404, providing for changes of venue generally, is available in those instances where transfer of a case for all purposes is desirable." H.R. Rep. 1130, *reprinted in* 1968 U.S.C.C.A.N. 1899, 1902. The very next sentence in the House Report notes that pretrial consolidation would *not* include transfer of cases for trial, precluding self-transfer by the section 1407 transferee court. *Id.* ("If . . . future experience justifies . . . consolidation and coordination for trial purposes as well, only minor amendments to the present language of the bill will be necessary").

Limiting section 1404 transfers to those allowed by the plain statutory language not only confines federal judges to their proper sphere of authority, *see In re American Continental Sec. Litig.*, 102 F.3d 1524, 1546 (9th Cir. 1996) ("The issue has been noted by commentators, and they have all concluded that self-transfer is not authorized by section 1404(a)") (Kozinski, J., dissenting), it also protects a plaintiff's interest in selecting a forum to litigate. *Id.* at 1546-57. "[A]s section 1404(a) is normally interpreted, a plaintiff's choice of forum can only be overcome if the transferee district is clearly more advantageous than the transferor district." *Id.* at 1547. This interest is particularly strong when the plaintiff is a sovereign protected by the Eleventh Amendment. The wrongful application of section 1404 cannot cure a violation of section 1407.

CONCLUSION

Amicus requests that the decision of the court below be reversed and that the transfer be vacated with directions to remand the case to the forum selected by petitioner.

Dated: July 3, 1997

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No. 96-1482

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

LEXECON, INC., *et al.*,
Petitioners,

v.

MILBERG WEISS BERSHAD HYNES & LERACH, A PARTNERSHIP, *et al.*,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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22 pp

QUESTION PRESENTED

Whether a district court, to which a case has been transferred solely for "consolidated pretrial proceedings" under the federal multidistrict litigation statute, 28 U.S.C. § 1407(a), may transfer the case to itself for purposes of trial, notwithstanding section 1407(a)'s explicit command that every such case "shall be remanded" at the conclusion of pretrial proceedings "to the district from which it was transferred."

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LEXECON, INC., *et al.*,
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On Writ of Certiorari
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BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters nationwide.[1] WLF seeks to promote and protect the free

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[1] Pursuant to Supreme Court Rule 37.6, WLF hereby states that no counsel for a party in this case authored this brief in whole

(continued...)

enterprise system and the economic and civil liberties of individuals and businesses through civil justice reform. WLF has devoted substantial resources to promoting civil justice reform by filing comments on proposals to amend the Federal Rules of Civil Procedure, by publishing monographs and similar educational materials, and by filing *amicus curiae* briefs in appropriate cases. *See, e.g.*, *Amchem Prods., Inc. v. Windsor*, No. 96-270 (June 25, 1997); *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 116 S. Ct. 873 (1996). WLF thus brings a broader perspective to the issues in this case than that presented by the parties in this action.

WLF is filing this brief with the consent of petitioners and respondents. WLF has lodged consent letters with the Clerk of the Court.

STATEMENT OF THE CASE

In order to avoid repetitive argument, WLF adopts the Statement of the Case of the petitioners. Briefly, this case presents the question whether a federal district court authorized to conduct consolidated pretrial proceedings may transfer a case to itself for purposes of trial, notwithstanding 28 U.S.C. § 1407(a)'s mandate that "[e]ach action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have previously been terminated . . . ." 28 U.S.C. § 1407(a). Citing an interest in efficient litigation, the Ninth Circuit below endorsed the increasingly widespread practice by which transferee courts

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[1](...continued)
or in part.

refuse to remand such cases to the original courts in which they were filed.

Petitioner Lexecon is a law and economics consulting firm. The respondents are two large law firms and certain individual lawyers within those firms who specialize in highly-publicized class action securities lawsuits. According to petitioners' allegations, after Lexecon's principal, petitioner Professor Daniel Fischel, testified for the defense in certain lawsuits filed by the respondents, respondents retaliated by trying to ruin Lexecon's reputation and put it out of business. Petitioners' complaint alleged that respondents falsely accused Lexecon of complicity with Charles Keating in the notorious *Lincoln Savings* savings and loan scandal, and by falsely portraying Professor Fischel as a crook and a racketeer.

Petitioners sued respondents for malicious prosecution, tortious interference with existing and prospective client relationships, abuse of process, defamation, and commercial disparagement. Petitioners filed their lawsuit in their home district, the Northern District of Illinois, alleging diversity jurisdiction. Initial pretrial matters were considered by that court. After six months of pretrial proceedings, respondents moved the Judicial Panel on Multidistrict Litigation (JPML) to transfer the case to the District of Arizona, pursuant to 28 U.S.C. § 1407, and consolidate the case with litigation involving the underlying *Lincoln Savings* dispute. However, before the JPML could rule on the motion, the presiding judge in the *Lincoln Savings* case recused himself from the *Lexecon* case because he felt his involvement in the *Lincoln Savings* case would make it improper for him to act as a judge in *Lexecon*.

Respondents nonetheless renewed their motion to transfer, and asked the JPML to sent the *Lexecon* case to any other judge in Arizona. Over petitioners' objection, the JPML granted respondents' motion, citing as grounds that there was an extensive document depository in Arizona and that there was a possibility of coordinating the action with an unfinished settlement involving one of the *Lincoln Savings* defendants. App. at 100a-102a.

Although there never were any coordinated proceedings and the reasons for granting the transfer evaporated, *see* Petitioners' Brief in Support of Petition for Writ of Certiorari at 6-7, the Arizona court proceeded to rule on various substantive motions, granting respondents' motion to dismiss the malicious prosecution and abuse of process claims. Petitioners then moved, pursuant to JPML Rule 14(d), to remand the case back to the Northern District of Illinois. The district court initially deferred decision on that motion until the parties completed discovery.

After the parties completed discovery, petitioners renewed their request to remand the case to Illinois. Respondents objected and filed their own motion to transfer the case permanently to Arizona, and filed a motion for summary judgment on all remaining issues. The Arizona court did not rule on petitioners' remand motion, but granted respondents summary judgment on all remaining issues except for one aspect of petitioners' defamation claim. App. at 64a-77a.

The Arizona court later denied petitioners' motion to remand and granted respondents' motion to transfer the case permanently to the Arizona court. App. at 61a-62a. Petitioners then petitioned the Ninth Circuit for a writ of

mandamus. A three-judge panel of the Ninth Circuit denied the petition, with Judge Kozinski dissenting. App. at 58a-59a. The trial on the defamation claim then went forward in the Arizona court, and respondents prevailed in a jury trial.

On appeal, a differently-constituted panel of the Ninth Circuit affirmed the district court in all respects. App. at 12a-15a. Judge Kozinski, the only member of the panel who had also ruled on the mandamus petition, again dissented. App. at 30a. Petitioners then timely petitioned this Court for a writ of certiorari, which this Court granted on May 13, 1997.

SUMMARY OF ARGUMENT

The Ninth Circuit erred in holding that an Arizona district court, to which an action was transferred for "coordinated or consolidated pretrial proceedings" under 28 U.S.C. § 1407(a), was permitted to transfer the action to itself and conduct a trial. The district court's retention of the case for trial contravened the clear mandate of Section 1407(a) which requires that "[e]ach action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred . . . ." 28 U.S.C. § 1407(a).

This unambiguous mandate is supported by the contemporaneous and subsequent legislative history of Section 1407. Congressional reports underscore what the statute clearly states, that the transferee court's role is only to conduct coordinated or consolidated pretrial proceedings, and at the conclusion of such proceedings to remand the case to the original court for trial. Congress contemplated that any additional role for the transferee court in conducting trial would require congressional authorization and, in fact, since

1968 Congress has considered and authorized a limited trial role for the transferee courts which is not applicable in this case. This subsequent history further demonstrates that Section 1407(a) as enacted did not authorize the transferee courts to conduct trials.

The erroneous widespread practice of transferee courts to "self-transfer" cannot be justified on the basis of JPML Rule 14(b) or long-standing practice. Although the JPML is authorized to prescribe rules for the conduct of its business, its authority is limited to rules "not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure." 28 U.S.C. § 1407(f). Any construction of JPML Rule 14(b) which authorizes self-transfer for trial is inconsistent with the clear mandate of Section 1407(a) and is therefore invalid. Further, the widespread use of self-transfer is not a legal basis for upholding the validity of the practice in the face of the congressional mandate to the contrary.

For these reasons and the reasons set forth below, the Washington Legal Foundation ("WLF") respectfully urges this Court to reverse the decision below.

ARGUMENT

I. THE PLAIN LANGUAGE OF 28 U.S.C. § 1407(a) REQUIRES THAT THE TRANSFEREE COURT REMAND THE CASE TO THE COURT IN WHICH THE ACTION WAS ORIGINALLY FILED.

This case presents a straightforward but important question concerning the authority of federal district court judges presiding over pretrial proceedings under 28 U.S.C. § 1407(a) to retain cases for trial. Under Section 1407(a), the

Judicial Panel on Multidistrict Litigation (JPML) may transfer cases filed in federal district courts to another federal district court for consolidated pretrial proceedings. Since the JPML was created in 1968, it has transferred over 90,000 cases for consolidated pretrial proceedings, but less than four thousand (representing less than four percent) of those cases were remanded back for trial to the district court in which the complaint was filed. Administrative Office of the United States Courts, *Judicial Business of the United States Courts: 1995 Report of the Director* 32, 80 (1995); App. at 30a (Kozinski, J., dissenting); *see also* Patricia D. Howard, *A Guide to Multidistrict Litigation*, 124 F.R.D. 479, 479 (1989) ("not uncommon" for transferee judge to transfer action to her own district or a district other than that in which it was filed).

As these statistics indicate, it has become commonplace for district courts hearing pretrial proceedings under Section 1407(a) to retain cases for trial. However, despite the prevalence of this practice, Section 1407(a) does not authorize district courts to retain such cases for trial. To the contrary, the clear and unmistakable mandate of the statute which authorizes the JPML to transfer cases requires that "[e]ach action so transferred *shall be remanded* by the [JPML] at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated . . ." 28 U.S.C. § 1407(a) (emphasis added).

The cardinal principle of statutory construction is that the language chosen by Congress be given its plain meaning. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 447-48 (1987); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982); *TVA v. Hill*, 437 U.S. 153 (1978). If the statutory language is clear, "that is the end of the matter; for the court . . . must give

effect to the unambiguously expressed intent of Congress ...." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984); *see also West Va. Univ. Hospitals, Inc. v. Casey*, 499 U.S. 83, 101 (1991); *Mallard v. U.S. District Court for the Southern District of Iowa*, 490 U.S. 296, 300-02 (1988); *Amoco Production Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 547-48 (1987) (unanimously rejecting Ninth Circuit's ruling that the term "in Alaska" should be interpreted in a general, "nontechnical" sense to mean the geographic region of Alaska).

The language "shall be remanded" is decidedly mandatory, leaving the court no room for discretion. Thus, the plain language of the statute makes clear that a case transferred for pretrial proceedings must be remanded back to the original district court for trial.

II. THE CONTEMPORANEOUS AND SUBSEQUENT LEGISLATIVE HISTORY OF SECTION 1407(a) DEMONSTRATES THAT CONGRESS INTENDED THE TRANSFEREE COURT TO REMAND THE ACTION BEFORE TRIAL.

The mandatory language of the statute is consistent with the statutory purpose of Section 1407, as evidenced by the legislative history. The report of the House Judiciary Committee, concerning the bill which became Section 1407, states:

> [T]he bill provides for the transfer of venue of an action for the limited purpose of conducting coordinated pretrial proceedings. The proposed statute affects only the pretrial stages in multidistrict litigation. It would not affect the place of trial in any

> case or exclude the possibility of transfer under other Federal statutes.
>
> * * *
>
> The subsection requires that transferred cases be remanded to the originating district at the close of coordinated pretrial proceedings. The bill does not, therefore, include the trial of cases in the consolidated proceedings. The experience of the Coordinating Committee was limited to pretrial matters, and the committee consequently considers it desirable to keep the legislative proposal within the confines of that experience. Additionally, trial in the originating district is generally preferable from the standpoint of the parties and witnesses, and from the standpoint of the courts it may be impracticable to have all cases in mass litigation tried in one district. * * *
>
> If proposed section 1407 should be enacted and future experience justifies extending it to include consolidation and coordination for trial purposes as well, only minor amendments to the present language of the bill will be necessary.

H.R. Rep. No. 1130, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. 1898, 1900, 1901-02.

Notably, since the 1968 enactment of Section 1407, Congress has extended consolidation for trial purposes to a limited class of cases, further underscoring that the 1968 legislation did not already permit a court to retain a case for trial under Section 1407. In 1976, Congress added subsection

(h) to Section 1407 to allow the multidistrict panel to order that *parens patriae* cases brought by state attorneys general under Section 4C of the Clayton Act be transferred for both pretrial purposes and for trial. Act of Sept. 30, 1976, Pub.L. 94-435, Title III, § 303, 90 Stat. 1396. This legislation would have been unnecessary had Section 1407 as originally enacted permitted the court to retain a transferred case for trial.

Further, in 1988, the House of Representatives passed a bill to amend Section 1407 to provide that in certain mass-disaster litigation involving multiple parties and multiple forums, "the transferee district court may, notwithstanding any other provision of this section, retain actions so transferred for the determination of liability." H.R. 4807, § 303, 100th Cong., 2d Sess. (1988). Although the House passed the legislation, this particular provision of the legislation was eventually dropped and was not enacted into law. *See* Act of Nov. 19, 1988, Pub.L. 100-702, 102 Stat. 4642. Again, this legislation would have been unnecessary had Section 1407 already authorized the transferee court to retain an action for trial.

Thus, the contemporaneous and subsequent legislative history makes clear that the Congress meant what the statute said, that transferee courts must remand the case back to the original court for trial.

III. THE PRACTICE OF "SELF-TRANSFER" CANNOT BE JUSTIFIED ON THE BASIS OF JPML RULE 14(b) OR THE IMPROPER PRACTICE OF DISTRICT COURTS.

Contrary to the Ninth Circuit's opinion, this "self-transfer" procedure cannot be justified on the basis of JPML

Rule 14(b).[2] App. at 14a. Although Section 1407(f) authorizes the JPML to prescribe rules for the conduct of its business, those rules must be "not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure." 28 U.S.C. § 1407(f). Section 1407(f) therefore does not permit the JPML to subvert the plain mandate of subsection (a) by issuing a rule authorizing self-transfer when the statute requires the remand of a case for trial.[3] *Cf. Frazier v. Heebe*, 482 U.S. 641, 645-46 (1987) (district court rule pertaining to admission of nonresident attorneys held inconsistent with Supreme Court rules of practice and procedure); *McKee v. Bi-State Dev. Agency*, 801 F.2d 1014 (8th Cir. 1986) (district court rule concerning finality of entry of judgment held inconsistent with federal statute).

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[2] JPML Rule 14(b) provides, in pertinent part: "[e]ach transferred action that has not been terminated in the transferee district court shall be remanded by the Panel to the transferor district for trial, unless ordered transferred by the transferee judge to the transferee or other district under 28 U.S.C. § 1404(a) or 28 U.S.C. § 1406."

[3] Moreover, 28 U.S.C. § 1404(a) likewise provides no authority for self-transfer. That provision for transfer of venue allows transfer as follows, "For the convenience of parties and witnesses, in the interest of justice, a *district court* may transfer any civil action *to any other district or division* where it might have been brought" (emphasis added). 28 U.S.C. § 1404(a). Nothing in this statute authorizes a district court to transfer an action to itself, and such a reading would be nonsensical given that 28 U.S.C. § 1404 was enacted decades before 28 U.S.C. § 1407. *See Amicus Curiae* Brief of Charles Alan Wright Supporting Petitioner on Petition for a Writ of Certiorari, 6 (April 11, 1997) ("A 1948 statute cannot be given a meaning it could not have had when it was adopted in order to provide a result under a 1968 statute that Congress specifically considered and expressly rejected.").

Moreover, Rule 14(b) governs only the internal procedures of the JPML, not the authority of the district court. Section 1407 only empowers the JPML to "prescribe rules for the conduct of its business . . . . " 28 U.S.C. § 1407(f). As dissenting Judge Kozinski noted, such rules are, in any case, not entitled to substantial deference from this Court. App. at 49a (rules are "entitled to deference only to the extent they cover JPML's business; they cannot broaden the transferee court's authority to act under Section 1404(a)."). Unlike rules promulgated pursuant to the Rules Enabling Act, 28 U.S.C. §§ 2072-74, the JPML rules " . . . are not voted upon by the Judicial Conference of the United States; they are not adopted by the Supreme Court; they are not put before Congress for possible modification or rejection." App. at 49a.

The JPML was no doubt convinced that its rule promoted the efficient administration of justice, but this Court should not allow this worthwhile goal to be accomplished through subverting the congressional mandate. Moreover, this practice cannot be justified on the basis of long-standing practice. As *amicus curiae* Charles Alan Wright stated, "If Congress has not given the courts authority to do something, they cannot acquire that authority by adverse possession." *Amicus Curiae* Brief of Charles Alan Wright, *supra*, at 8; *cf. Finley v. United States*, 490 U.S. 545 (1989) (federal courts lacked power to exercise pendent party jurisdiction notwithstanding widespread lower court acceptance of such jurisdiction).

Although courts following the Second Circuit's decision in *Pfizer, Inc. v. Lord*, 447 F.2d 122, 124-25 (2d Cir. 1971), have often allowed this self-transfer practice, commentators

have been overwhelmingly critical.[4] *See, e.g. Report of the American Bar Association Section of Antitrust Law Task Force to Review the Supreme Court's Decision in California v. ARC American Corp.*, 59 ANTITRUST L. J. 273, 302 (1990) ("[T]he use of Section 1404(a) transfers to consolidate multidistrict cases for trial is of dubious legal validity."); George T. Conway III, Note, *The Consolidation of Multistate Litigation in State Courts*, 96 YALE L.J. 1099, 1102-03 (1987) ("[C]onsolidation for trial almost certainly defies both the letter of section 1407 and the intent of its drafters." (footnotes omitted)); Robert H. Transgrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779, 809 (1985) ("[It] seems clear that the lower federal courts have done by judicial fiat what Congress refused to do by statute in 1969: amend section 1407 to allow transfers for trial."); Note, *The Judicial Panel and the Conduct of Multidistrict Litigation*, 87 HARV. L. REV. 1001, 1030-31 (1974) (legislative history of section 1407 emphasizes it would be used only for pretrial proceedings); John F. Cooney, Comment, *The Experience of Transferee Courts Under the Multidistrict Litigation Act*, 39 U.CHI. L. REV. 588, 606 (1972) ("[T]he apparently mandatory nature of the remand clause . . . implies that transferee courts lack this jurisdiction [to grant a section 1404 motion]."); *see also* additional authorities noted at app. 35a-36a (Kozinski, J., dissenting.).

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[4] Lower courts authorizing self-transfer have cited *Pfizer* like a mantra, but that decision could hardly be considered seminal given its limited analysis. *See id.* at 124-25. Nonetheless, the lower courts have displayed a deference to *Pfizer* which is remarkable for the courts' lack of critical analysis. *See* App. at 32a-34a (Kozinski, J., dissenting); *id.* at 59a (Kozinski, J., dissenting) ("[m]ost [courts following *Pfizer*] have simply taken their place at the head of an ever-growing string cite.").

It may well be that judicial economy or other policy considerations would be served by allowing Section 1407(a) transferee courts to conduct trials. Or perhaps not. Consideration of the convenience of parties and witnesses, and traditional deference to the plaintiff's choice of forum, may suggest otherwise. *See* H.R. Rep. No. 1130, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. at 1901 (" . . . trial in the originating district is generally preferable from the standpoint of the parties and witnesses, and from the standpoint of the courts it may be impracticable to have all cases in mass litigation tried in one district."). That policy decision is not obvious, nor is it one that Congress has delegated to transferee courts under Section 1407(a).

Along these lines, this case demonstrates why no court should presume that policy considerations dictate retention by the transferee court of a transferred case for trial. The petitioners alleged that respondents falsely defamed petitioners by making unfounded allegations concerning petitioners' ties to Charles Keating and the notorious *Lincoln Savings* scandal. Through the use of a Section 1407(a) transfer, and under the guise of consolidating pretrial proceedings, respondents forced petitioners to try their allegations in a distant forum where resentment toward Keating and anyone connected with him was likely to be most intense. Moreover, there was no connection between Arizona

and the parties, the witnesses, or the law applied to the case.[5] App. at 45a-47a (Kozinski, J., dissenting).

But, in any event, that policy decision is for Congress and not for the federal courts. Section 1407(a) does not permit the transferee court to exercise its discretion to retain a transferred action for trial. Our civil justice system cannot function fairly or effectively if judges ignore statutes which confine their authority, and this Court should not countenance a practice by which judges subvert the clear congressional mandate in order to enhance their judicial authority.

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[5] The Ninth Circuit accuses petitioner Lexecon of being "no stranger to the District of Arizona", app. at 18a, but then cites only Lexecon's participation in the underlying *Lincoln Savings* litigation and the transferee court's familiarity with the *Lexecon* suit. In these matters Lexecon's appearance in Arizona could hardly be considered voluntary. First, Lexecon appeared as a defendant in a lawsuit in which it claimed it was improperly named by the respondents as a means of retaliation against Lexecon, and second, it appeared as a plaintiff which had opposed the transfer of its lawsuit to Arizona. It may be accurate to say that Lexecon was not a stranger to Arizona, but under these circumstances it was no more than an accidental tourist.

CONCLUSION

For the foregoing reasons, WLF respectfully requests that this Court reverse the decision of the Ninth Circuit.

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No. 96-1482

IN THE

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OCTOBER TERM, 1996

LEXECON INC., *et al.*,
Petitioners,

v.

MILBERG WEISS BERSHAD HYNES & LERACH, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC. AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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IN THE

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LEXECON INC., *et al.*,
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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC. AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

This *amicus curiae* brief is submitted, with the written consent of all parties, on behalf of the Aerospace Industries Association of America, Inc. ("AIA").[1] The parties' letters consenting to the filing of this brief have been filed in the office of the Clerk.

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[1] This brief was authored by counsel for AIA. No "person or entity, other than the *amicus curiae* [or] its members, . . . made a monetary contribution to [its] preparation or submission." Sup. Ct. R. 37.6.

INTEREST OF *AMICUS CURIAE*

AIA is the national, non-profit trade association representing manufacturers of commercial, military, and business aircraft, helicopters, aircraft engines, missiles, spacecraft, and related components and equipment. AIA is comprised of fifty-five member companies, including many of the nation's largest corporations.

AIA member corporations are no strangers to complex, multiparty, multidistrict litigation of the type Congress had in mind when it enacted 28 U.S.C. § 1407. For example, AIA member corporations are frequently parties to the aviation accident cases consolidated for pretrial proceedings by the MDL Panel. Air crash cases "present a prime example of the need which gave rise to enactment of Section 1407." *In re Air Crash Disaster Near Chicago*, 476 F. Supp. 445, 447 (J.P.M.L. 1979). The enormous costs of such litigation would be multiplied manyfold if this Court, repudiating thirty years of practical experience, holds that a § 1407 transferee court conducting pretrial proceedings lacks the authority to transfer for trial pursuant to 28 U.S.C. § 1404(a).

A primary reason why *amicus* is submitting this brief is to highlight the differences between this case and the vast majority of multidistrict cases that would be impacted by a holding that a § 1407 transferee court lacks the power to order a § 1404(a) transfer. Whether in this particular case the § 1407(a) transfer by the MDL Panel and § 1404(a) transfer by the transferee court made sense, or were an appropriate exercise of the various tribunals' transfer powers, are very different questions from whether, in general, the § 1407 transferee court has the power to order

a § 1404(a) transfer as part of the "pretrial proceedings" in a case. To the extent the Court may share Petitioner's belief that this case was not factually appropriate for the § 1407(a) or § 1404(a) transfers, *amicus* submits that the solution is not to discard thirty years of positive experience and prohibit all § 1404(a) transfers by a § 1407 transferee court.

SUMMARY OF ARGUMENT

1. The atypical factual and procedural posture of this case, as compared to the cases usually subject to transfer under § 1407(a) and § 1404(a), make it an inappropriate vehicle in which to address a critical substantive issue of relevance to all multidistrict litigation. The Court should not reach the issue of whether a § 1407 transferee judge conducting "pretrial proceedings" may rule on a § 1404(a) transfer motion if, as AIA believes, there are narrower grounds upon which to decide this particular case.

2. If the Court does reach the substantive issue, compelling reasons of fairness, efficiency, and economy support an interpretation that upholds the time-tested use of § 1404(a) transfer powers by the § 1407 transferee court. The rationale for a § 1407 "pretrial proceedings" transfer applies with at least equal force to a § 1404(a) transfer for trial. The unique facts of Petitioners' case do not highlight the advantages of a subsequent § 1404(a) transfer, but in the majority of multiparty, multidistrict settings these benefits are of great significance. The Court should not lightly conclude that the statutory scheme deprives the judicial system of these important benefits.

ARGUMENT

I. THE COURT SHOULD DISMISS THE WRIT OR AFFIRM THE DECISION BELOW WITHOUT DECIDING THE POWERS OF A § 1407(a) TRANSFEREE COURT.

A. Lexecon Did Not Pursue The Remedies Available To It In This Atypical MDL Litigation.

At the outset, *amicus* submits that this may be just too atypical a case to use as the vehicle to decide the future course of MDL litigation. This "tag-along" defamation action is about as far removed from the typical MDL case as one can get. An example of a more typical MDL context, the air crash disaster, has already been mentioned. The Court is well aware of other familiar MDL contexts: environmental, labor/discrimination, securities, antitrust, trademark and copyright, patent infringement and validity, mass tort, etc. *See* David F. Herr, MULTIDISTRICT LITIGATION ¶ 5.4.2 (1986 & Supp. 1996) (citing examples in each category). Recognizing that every case may be important to the immediate parties, it is nevertheless fair to say that Lexecon's desire for a new venue to pursue a single surviving defamation claim provides a poor framework for considering the important issues of multidistrict litigation. *See, e.g., Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 122 (1994) (writ dismissed as improvidently granted even when question presented "would seem to be of great practical importance to these litigants").

Petitioner attempts to "color" its presentation of the legal issue with a strong undertone that both the original § 1407(a) transfer and the subsequent § 1404(a) transfer

were unjustified by the facts. *See, e.g.*, Pet. Br. at 7 (arguing that the § 1407 transferee judge had no familiarity with underlying litigation, no coordinated pretrial proceedings took place, document depository was never used, etc.). *Amicus* does not concede that any case-specific injustice occurred; if it did, however, the remedy sought—preventing § 1407 transferee judges from ever ordering another § 1404(a) transfer—goes far beyond what is necessary to eliminate the alleged injustice. There were remedies available to Petitioner when faced with transfer orders with which it did not agree. A decision by the MDL Panel to transfer a case under § 1407(a) is reviewable under 28 U.S.C. § 1651, the All Writs Act. *See* 28 U.S.C. § 1407(e); *In re Regents of Univ. of Cal.*, 964 F.2d 1128, 1136 (Fed. Cir. 1992); *In re Ivy*, 901 F.2d 7, 10 (2d Cir. 1990). Lexecon never sought such review. Similarly, a § 1404(a) transfer order can be attacked for abuse of discretion. *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981).

One other procedural lapse by Lexecon is significant. Lexecon complains that this case should have been remanded for trial, but it never sought remand from the sole authority empowered to grant such a request—the MDL Panel itself. Lexecon cannot escape the language of § 1407(a): "'[e]ach action so transferred shall be remanded *by the panel* at or before the conclusion of such pretrial proceedings . . . .'" Pet. Br. at 3 (quoting § 1407(a)) (emphasis shifted). Having ignored its dereliction entirely, Lexecon's brief gives the Court no reason to excuse it.

At this point, because of its own tactical decisions, Petitioner is left to argue that the § 1407 transferee court

was utterly without power to order a § 1404(a) transfer. This Court should not undo thirty years of settled law in order to remedy any perceived injustice to this oddly situated litigation. As Justice Thomas warned in his dissent in *Doggett v. United States*, 505 U.S. 647, 659 (1992): "Just as 'bad facts make bad law,' so too odd facts make odd law."

The interests of the litigants in countless present and future cases having enormous financial consequences would be adversely affected if this Court were to rule that a § 1404(a) transfer is somehow uniquely beyond the scope of "pretrial proceedings." This is the wrong case in which even to consider making such a holding.

B. Because Of The Factual And Procedural Oddities, The Result Below Can And Should Be Affirmed Outside The Merits.

Petitioner's failures properly to seek below the relief now requested enable the Court to resolve this atypical case on narrow grounds. Any argument made below that supports the lower court's judgment, "whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals," may be presented to this Court as a basis for affirming the result below. *E.g.*, *Granfinanciera, S. A. v. Nordberg*, 492 U.S. 33, 38-39 (1989); *see also United States v. New York Tel. Co.*, 434 U.S. 159, 166 n.8 (1977) ("[T]he prevailing party may defend a judgment on any ground which the law and the record permit that would not expand the relief it has been granted."). The question purportedly presented by this case is not squarely before the Court because Lexecon did not request remand from the MDL Panel prior to trial and then

seek review, pursuant to 28 U.S.C. § 1651, of any denial. Accordingly, this Court may affirm the decision below on this basis.

Having failed to request remand from the only body that could have entered such an order, Lexecon played its hand at trial and now wishes to try again in another venue. Preventing two bites at the apple is a primary reason for the harmless error statute, 28 U.S.C. § 2111, which would appear to apply squarely here. *See United States v. Lane*, 474 U.S. 438, 444 (1986) (harmless error statute allows Court to ignore errors or defects which do not affect the substantial rights of the parties).

Alternatively, dismissing Petitioner's writ of certiorari as improvidently granted would recognize that the Court's certiorari jurisdiction should be used sparingly to decide questions of true importance. *See, e.g.*, *Jones v. State Bd. of Educ.*, 397 U.S. 31, 32 (1970) (emergence after oral argument of fact not previously obvious in record "render[s] the case an inappropriate vehicle for this Court's first decision" in a particular subject area; writ dismissed); *Needelman v. United States*, 362 U.S. 600, 600 (1960) ("record does not adequately present the questions tendered in the petition"; writ dismissed).

II. IF THE MERITS ARE REACHED, THE COURT'S DECISION SHOULD PRESERVE THE BENEFITS DERIVED WHEN A § 1404(a) TRANSFER FOLLOWS A § 1407(a) TRANSFER.

If the Court does reach the merits of this case, the decision below should be affirmed. Respondents' brief discusses the compelling statutory justification for the

procedures that have worked so well for almost thirty years. Accordingly, *amicus* offers only a summary rebuttal of Petitioner's statutory argument.

A § 1407 transferee judge is authorized to conduct "pretrial proceedings," which include the resolution of a § 1404(a) transfer motion. The statutory language, the applicable legislative histories, and the historical background relating to Congress' efforts to deal efficiently and fairly with multiparty, multidistrict litigation all support this reading and the Ninth Circuit's decision below.

To affirm the decision below on the merits, it is sufficient to hold that federal law permits a § 1407 transferee judge to rule on a § 1404(a) transfer motion, like any other pretrial motion, as part of the conduct of "pretrial proceedings." This straightforward holding will preserve the simplifications, efficiencies, and economies that courts and litigants have rightly come to expect from the interplay of § 1407 and § 1404(a).

If, as Judge Kozinski (the dissenter below in this case) has written in another case, appellate judges crafting rules in the *absence* of statutory imperative are to "select the rule of law that advances fairness while diminishing the risk and cost of litigation," appellate judges (and justices) reviewing procedures *entirely consistent with* the law should be cognizant of those same concerns—even more so where the procedures are tried and tested "in the crucible of litigation." *See United States ex rel. Balzer Pac. Equip. Co. v. Fidelity & Deposit Co.*, 895 F.2d 546, 554-55 (9th Cir.

1990) (Kozinski, J., dissenting).[2] There are compelling reasons why a § 1404(a) transfer for trial often follows a § 1407 pretrial consolidation: fairness, judicial economy, and reduced costs are among the most important.

For example, individual plaintiffs' suits arising out of a commercial airplane accident are typically filed in various jurisdictions across the country. For defendants in such cases, and for the federal judicial system, the "burdens of multiple lawsuits," *see Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353 (1983), are severe. Effective coordination of such cases requires use of all available statutory tools. *See id.*

Aircrash cases originating in or removed to the federal court system are commonly consolidated by the MDL Panel in the jurisdiction nearest the "situs of the crash." *In re Air Crash Disaster at Chattanooga*, 393 F. Supp. 1406, 1407 (J.P.M.L. 1975); *In re Air Crash Disaster Near Upperville*, 393 F. Supp. 1089, 1090 (J.P.M.L. 1975); *In re Air Crash Disaster at Florida Everglades*, 360 F. Supp. 1394, 1395 (J.P.M.L. 1973); *In re Air Crash Disaster at Huntington*, 342 F. Supp. 1400, 1403 (J.P.M.L. 1972). The reason is obvious—important witnesses, documents, and physical evidence are all likely to be found near the crash site; therefore, discovery can most effectively and expeditiously

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[2] "[I]mpractical appellate opinions" that are not mindful of the "realities of litigation" and which "unnecessarily complicate the litigation process" are, Judge Kozinski wrote, "like the proverbial crocodile in the bathtub: You can't ignore them and they immensely complicate the task at hand." *United States ex rel. Balzer Pac. Equip. Co.*, 895 F.2d at 554.

be supervised in the district nearest that site. *In re Air Crash Disaster at John F. Kennedy Int'l Airport*, 407 F. Supp. 244, 246 (J.P.M.L. 1976); *In re Air Crash Disaster Near Upperville*, 393 F. Supp. at 1090; *In re Air Crash Disaster at Charlotte*, 393 F. Supp. 1404, 1406 (J.P.M.L. 1975).

A typical transfer order from the MDL Panel underscores the benefits. In ordering transfer of cases arising out of an aircraft accident near Colorado Springs, Colorado, the Panel found that

> the actions in this litigation involve common questions of fact and that centralization . . . in the District of Colorado will best serve the convenience of the parties and witnesses and promote the just and efficient conduct of this litigation. . . . Centralization under Section 1407 is desirable in order to avoid duplication of discovery, prevent inconsistent pretrial rulings and conserve the resources of the parties, their counsel and the judiciary.

In re Air Crash Near Colorado Springs, Colo., on Mar. 3, 1991, MDL No. 1022, slip op. at 1 (J.P.M.L. Oct. 13, 1994).

A subsequent 1404(a) transfer for trial advances and increases these benefits. Such a transfer is not, of course, automatic following a § 1407 consolidation, in air crash litigation or any other context. *See, e.g., In re Am. Fin. Corp. Litig.*, 434 F. Supp. 1232, 1234 (J.P.M.L. 1977)

("[P]rior denial of a [§] 1404(a) transfer is not dispositive of a [§] 1407 motion because of the different considerations that underlie these two statutes."). Unless the proposed transferee court has subject matter jurisdiction and personal jurisdiction over the parties and venue is proper, transfer under § 1404(a) is not an option. Thus, in the Colorado Springs aircrash cases previously referenced, the § 1407 transferee court deciding a subsequent § 1404(a) transfer motion first found that it had jurisdiction and that venue was uncontested (and proper). *In re Air Crash Near Colorado Springs, Colo., on Mar. 3, 1991 (MDL-1022)*, C.A. No. 94 N 9102, slip op. at 17-18 (D. Colo. Jan. 30, 1997).

Where jurisdiction and venue lie, the Court must also consider the convenience of the parties and the interests of justice before finalizing any § 1404(a) transfer. *See* 17 James Wm. Moore et al., MOORE'S FEDERAL PRACTICE ¶ 111.12[1], at 111-53 to -60 (3d ed. 1997). Not surprisingly, balancing the convenience factors often means that § 1404(a) transfers for trial follow § 1407(a) transfers in major multidistrict cases. *See generally* 8 James Wm. Moore, MOORE'S FEDERAL PRACTICE ¶ 42.11[2][c], at 42-24 to -25 (3d ed. 1997) (In mass tort litigation, "the logical next step [after a § 1407(a) transfer is] a transfer for consolidation and trial under [§] 1404(a)."); Federal Judicial Center, MANUAL FOR COMPLEX LITIGATION, THIRD at 254 (1995). The benefits of convenience, diminished risk of inconsistent adjudications, and reduced costs are frequently compelling in such litigation.

For example, the court in the Colorado Springs cases ruled that "the similarity of the parties and issues in all of the cases transferred to this court for pretrial purposes leads

me to conclude that transfer to this court for trial is warranted," even though such a transfer "would deprive [plaintiffs] of [their] choice of forum and inconvenience some parties and witnesses." *In re Air Crash Near Colorado Springs, Colo., on Mar. 3, 1991 (MDL-1022)*, C.A. No. 94 N 9102, slip op. at 20. The court found that "[n]o other district is better situated to address the concerns of convenience of parties and witnesses and the interests of justice," particularly where "[t]ransfer to this court would provide a single forum for determining the issues in this litigation." *Id.* at 19, 20; *see also In re Air Crash Disaster at Detroit Metro. Airport*, 737 F. Supp. 391 (E.D. Mich. 1989) (Consolidating "all [156] pending cases for a joint trial on all liability issues."); *In re Air Crash Disaster at Sioux City, Iowa*, No. 89 C 8082 (MDL No. 817), 1991 U.S. Dist. LEXIS 10964, at *3 (N.D. Ill. July 29, 1991) (Consolidating all pending cases "for trial on liability and punitive damages.").

Describing this sort of disposition as a "power grab," App. at 57, is rather unsubtle advocacy. The § 1407/ § 1404(a) combination is, in fact, a sensible use of the statutory authority granted to the district courts by Congress, all in an effort to streamline and manage large cases, avoid inconsistent results, and conserve the resources of all involved. As the current Chief Judge of the MDL Panel has observed, "the major advantage arising from cases being centralized under the MDL is the fact that, as a practical matter, most cases are disposed of by the transferee court under [§] 1404 . . . , by settlement or by other final disposition." *Judge John F. Nangle: Complex, Related Cases Benefit from Centralization*, THE THIRD BRANCH 10 (Dec. 1995).

This Court, if it reaches the merits, should not destroy this advantage on the strength of Petitioner's myopic arguments.

CONCLUSION

As argued by Respondents, and supported by the foregoing additional reasons, the writ should be dismissed as improvidently granted, or the judgment of the Ninth Circuit below should be affirmed.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

LEXECON INC., *et al.*,
Petitioners,

v.

MILBERG WEISS BERSHAD HYNES & LERACH, *et al.*,
Respondents

On Writ of Certiorari to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF *AMICI CURIAE* CREDIT SUISSE FIRST BOSTON CORPORATION, BEAR, STEARNS & CO., INC., DILLON, READ & CO. INC., DONALDSON, LUFKIN & JENRETTE SECURITIES CORPORATION, MORGAN STANLEY & CO. INCORPORATED, OPPENHEIMER & CO., INC. AND PRUDENTIAL SECURITIES, INC. IN SUPPORT OF RESPONDENTS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1996

No. 96-1482

LEXECON INC., *et al.*,
Petitioners,

v.

MILBERG WEISS BERSHAD HYNES & LERACH, *et al.*,
Respondents

On Writ of Certiorari to the United States Court of Appeals
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BRIEF OF *AMICI CURIAE* CREDIT SUISSE FIRST BOSTON CORPORATION, BEAR, STEARNS & CO., INC., DILLON, READ & CO. INC. DONALDSON, LUFKIN & JENRETTE SECURITIES CORPORATION, MORGAN STANLEY & CO. INCORPORATED, OPPENHEIMER & CO., INC. AND PRUDENTIAL SECURITIES, INC. IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICI CURIAE*

Credit Suisse First Boston Corporation, Bear, Stearns & Co., Inc., Dillon, Read & Co. Inc., Donaldson, Lufkin &

Jenrette Securities Corporation, Morgan Stanley & Co. Incorporated, Oppenheimer & Co. Inc. and Prudential Securities, Inc. submit this brief *amici curiae* in support of respondents, by written consent of all parties, pursuant to Rule 37.3 of the Rules of this Court.[1]

Amici are leading corporate and investment banking firms, helping to raise and invest capital for companies and investors located in the United States and around the world, on domestic and international markets. They provide financial advisory, capital raising, sales and trading services and financial products both to users and suppliers of capital. They underwrite debt and equity offerings by some of the most preeminent names in American business, and engage in research, sales and trading of securities for their clients and for themselves in equity markets across the United States and abroad.

The securities markets, in which *amici* play a critical role, are themselves vital to U.S. commerce. American

[1] No counsel for a party authored this brief in whole or in part, and no other person or entity made any monetary contribution to the preparation or submission of this brief.

businesses engaged in 874 initial public offerings of securities last year, raising over $50 billion in the process to fund their operations. *See* Securities Data Co., *1996 U.S. Initial Public Offerings*. At the end of 1996, over 9,000 companies were listed on the three major securities markets in the United States, and their market capitalization was over $8.5 trillion. Securities Industry Association, Securities Industry Fact Book 40 (1997). The importance of the securities industry to United States commerce is also reflected in the amount of litigation it generates. For the last ten years, at least 1,700, and as many as 3,000, cases per year arising under the securities laws have been filed in the federal district courts. *See* Administrative Office of the United States Courts, *Judicial Business of the United States Courts, Report of the Director*, 1987-1996, Table C-2.

As major firms in the securities industry, *amici* have an interest in seeing that the rules governing cases that are transferred by the Judicial Panel on Multidistrict Litigation (the "JPML") for coordination or consolidation are developed and applied in a manner that allows for the just, efficient, speedy and

inexpensive determination of these actions. Securities firms are frequent participants in complex, multi-party and multi-court civil actions that are frequently the subject of referral to the JPML. In fact, over 21% of the cases entered on the JPML's docket since its inception in 1968 to the present (256 out of 1,197 groups of actions that have been considered for consolidation) are identified as securities cases. *See* Judicial Panel on Multidistrict Litigation, *Multidistrict Automated Tracking System* - Citation Summary, All Dockets. Efficient management and disposition of these cases, and reduction of the burdens that can be imposed on parties, witnesses and the judicial system from the proliferation of related cases in different courts, are of great concern to the securities industry as a whole.

The parties and the transferee court invest an extensive amount of time and resources during pretrial proceedings. Such proceedings can take years in complex cases, and include discovery disputes, motions to dismiss and summary judgment motions through which the transferee court becomes extremely familiar with the facts and law of the case. In many cases, only the

transferee court will be in a position to achieve an economical, efficient, just, speedy and least burdensome disposition of such cases at trial.[2] There is no reason to deny that court such power, when the requirements of section 1404 are met.

Affirming the decision of the court below, and permitting multiple cases involving common questions of fact and law to be determined in a single proceeding by a single court, when appropriate, will reduce the burgeoning demands on the federal courts' time, the burden on witnesses, the costs to the parties and the possibility of inconsistent verdicts in such litigation, and thus promote the efficient administration of justice. It also accords with the express language of the relevant statutes.

---

[2] The Federal Rules of Civil Procedure mandate consideration of the same interests when applying the Rules in any action, an indication of the primacy of these concerns in addressing procedural questions such as the location and management of pending litigation. *See* Fed. R. Civ. P. 1.

SUMMARY OF ARGUMENT

Sections 1404 and 1407 are complementary, not contradictory, procedural mechanisms that allow the courts to promote efficient administration of justice and resolution of claims. Together, they permit the district courts to minimize, to the extent possible, the burden on witnesses and the costs and risks to the parties that can result from litigating multiple, related cases in different and inconvenient forums.

Section 1404 permits transfer of a case to any district where it could have been brought initially, when such transfer serves the convenience of the parties and witnesses, and the interest of justice. 28 U.S.C. § 1404. Section 1407 permits the transfer to one court of one or more cases "for the convenience of parties and witnesses and . . . [to] promote the just and efficient conduct of such actions" any time two or more cases are pending in different courts with a common question of fact. 28 U.S.C. § 1407.

The two sections thus apply similar standards to different subsets of cases (although there is a substantial degree of overlap), and permit different types of transfer when those

standards are met in the cases which they cover. Section 1407 permits transfer to any court in the country of any case that shares a question of fact with another pending case, but is limited to pretrial matters. Section 1404 limits transfer to districts in which the original case could have been brought properly, but it does not require any related case to be pending there, and it permits a complete transfer of the case for all purposes. This Court should permit each type of transfer to continue to fulfill its mandated function in the federal court system.

Contrary to petitioners' argument, Rule 1407(a) does not speak to the power of the transferee district court to transfer a case for trial, much less prohibit such action. Rather, section 1407(a) addresses only the power of the Judicial Panel on Multidistrict Litigation, and grants that panel the power to transfer a case to any district court in the country, regardless of the appropriateness of venue in such court, for pretrial proceedings. Section 1407(b) governs the powers of the transferee district court, and places no restrictions on such court's power to address all pretrial proceedings.

Such pretrial proceedings include motions to transfer brought pursuant to 28 U.S.C. § 1404. There is nothing in section 1407 which limits the power of the Article III court to whom a case has been transferred to act on such a motion, and this Court should not read such a limitation into the transferee court's power. The provisions set forth in section 1404 governing the circumstances in which cases may be transferred to another court for trial, and the sound discretion of the district courts, provide all the procedural protections that litigants require and that Congress saw fit to grant.

If the provisions and limitations of section 1404 are met, a transferee court that has obtained jurisdiction over a case pursuant to a ruling from the JPML should have the same power that any other district court would have to transfer a case. A transferee court has all the power of the transferor court in every other respect, including the power to terminate the cases by granting a motion to dismiss or a motion for summary judgment, and to affect drastically the scope and nature of the litigation through its rulings on discovery and other pretrial issues. No statutory or

logical reason exists to deprive it of the power to transfer the cases, pursuant to section 1404, to a court that is more convenient to the parties and witnesses and better able to serve the interests of justice, whether that court is itself or some other court.

Complex, multi-party cases arising out of the same underlying set of facts, such as many securities law, mass tort and disaster cases, are particularly good candidates for consolidation under section 1407, and for transfer under section 1404, and there is no reason to believe that Congress intended the use of one to foreclose or limit the ability of a court to consider the use of the other. Many of the same factors that the JPML is obliged to consider in determining a 1407 motion are also considered in deciding a 1404 motion. The factors that led the JPML panel to transfer cases to a single court pursuant to Section 1407 may also favor transfer of the cases for trial pursuant to Section 1404. In fact, given the familiarity which the transferee court can be expected to obtain in the course of pretrial proceedings, the complexity of many of the cases which are the subject of proceedings pursuant to Section 1407, and the prerequisite that

cases consolidated under section 1407 all involve common questions of fact, one would expect many cases consolidated under section 1407 to prove suitable to transfer pursuant to section 1404. Such transfer can promote judicial efficiency, avoiding the necessity of multiple trials or duplicative motion practice by different judges on the same issues, with many of the same witnesses.

Taking 1404 power away from a transferee court needlessly hobbles that court, and can rob the 1407 procedure of at least a portion of its efficacy. The purposes which section 1404 was designed to further - - to better serve the convenience of parties and witnesses, and the interests of justice - - are likely to be met in cases that have been consolidated pursuant to section 1407, and transfer pursuant to section 1404 should at least be open to consideration in such cases at any appropriate time.

ARGUMENT

A. SECTION 1404 GOVERNS TRANSFERS OF ACTIONS TO A DISTRICT COURT FOR TRIAL, AND NOTHING IN SECTION 1407 PROHIBITS THE NORMAL APPLICATION OF THAT SECTION BY A TRANSFEREE JUDGE.

28 U.S.C. § 1404(a) provides:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

The drafters of section 1404(a) "intended [it] to be generally applicable to all civil actions, whether governed by general or special venue provisions and whether the special venue provisions were contained in Title 28 or in other titles of the United States Code." 1 J. Moore, A. Vestal & P. Kurland, *Moore's Manual: Federal Practice and Procedure*, § 7.12[1] at 7-34 (1995). As this Court has ruled:

> The reach of "any civil action" is unmistakable. The phrase is used without qualification, without hint that some should be excluded.

In re Collett, 337 U.S. 55, 58 (1949).

Section 1407 does not act to overrule this principle, which has been in place for almost 50 years. Petitioners would have this Court read into section 1407 an implicit decision by Congress to prohibit application of section 1404 by the district court to which a case is transferred by the JPML. Nothing in the text or legislative history of Section 1407 suggests that Congress intended to preclude the normal application of Section 1404, however, and this Court should not lightly assume such an intent. *See Girouard v. United States*, 328 U.S. 61, 69 (1946) ("It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law.").

In effect, such a prohibition would preclude transfer of any case until a case is ready to go to trial, and the decision would then have to be made by the original transferor court(s), possibly in hundreds, if not thousands, of separate motions. In the twelve months ended September 30, 1996, for example, over 6,000 cases were transferred by the JPML to the United States District Court for the Eastern District of Pennsylvania, and over 8,000 were transferred to the District Court

for the Northern District of Alabama. The Eastern District of Texas received 185 cases, the Southern District of Ohio 174 cases, and the Northern District of Illinois 123 cases. On a smaller, but still significant level in terms of effective case management and judicial efficiency, the Eastern District of Michigan received 80 cases in that year, the District of New Jersey 57 cases, the Southern District of California 54 cases, the Northern District of California 31 cases, the District of Maryland 28 cases, the Central District of Illinois 25 cases, the Southern District of New York 24 cases, the Eastern District of New York 19 cases, and the District of Minnesota 19 cases. *See* Administrative Office of the United States Courts, *Judicial Business of the United States Courts, 1996 Report of the Director*, Table S-21 at 74-76.

Although these numbers may include more than one consolidated case transferred into the particular district, they still reflect the consolidation of tens, hundreds or thousands of related cases before a single court. In many of those cases, the ordinary application of section 1404 would warrant a court's decision to transfer the cases for all purposes "for the convenience

of parties and witnesses and in the interests of justice," as the statute permits. Nothing in section 1407 precludes or should preclude the transferee court from weighing and applying such principles.

Petitioners misleadingly suggest that section 1404(a) "does not recognize judicial efficiency as a basis for transfer." Brief for the Petitioners at 20-21, n6. In fact, however, section 1404(a) explicitly permits courts to consider "the interests of justice" in determining whether to transfer a case, and for 50 years, even before the enactment of section 1404, this Court has recognized the district court's ability to weigh, along with the burden on parties and witnesses, "all other practical problems that make trial of a case easy, expeditious, and inexpensive." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241, 253-54 (1981) (recognizing court's own administrative and legal problems as factors in *forum non conveniens* determinations, and that courts may transfer cases more freely pursuant to section 1404's "relaxed" and "easy change of

venue" provisions than under the common law doctrine of *forum non conveniens*).

Numerous courts have held that judicial efficiency is a proper consideration to weigh in the balance of interests a court conducts pursuant to section 1404. *See, e.g., Theriault v. Silber*, 547 F.2d 1279, 1280 (5th Cir.) (transfer permissible because to do otherwise "would have caused extravagantly wasteful and useless duplication of time and effort of the federal courts"), *rehearing denied*, 551 F.2d 863, *cert. denied*, 434 U.S. 871, *rehearing denied*, 434 U.S. 943 (1977) (internal quotations omitted); *Robinson v. Town of Madison*, 752 F. Supp 842, 847 (N.D. Ill. 1990) (efficient administration of court system is "focus" of interest of justice consideration). And petitioners do not even address, much less rebut, the likelihood that transfer of such cases will serve the convenience of parties and witnesses, which they concede is a legitimate objective for the courts to weigh in a motion to transfer pursuant to section 1404.

Petitioners seek to raise a plaintiff's initial choice of the forum in which to bring an action to a binding determination, ignoring the long-standing and frequently applied provisions of section 1404 that permit the district courts to override the plaintiff's choice and transfer cases when appropriate. See Brief for the Petitioners at 19 ("At the end of those [pretrial] proceedings, plaintiffs are **guaranteed** that their cases will be returned to the forum they originally selected.") (emphasis added). At a minimum, petitioners seek to delay any consideration of such an issue until a case is returned to its original district by the JPML at the conclusion of all pretrial proceedings, and to force such determination to be made by the individual district court judges in which plaintiffs initially filed their case.

Such an outcome is not mandated by Section 1407. Rather, as Petitioners later concede, section 1407 is designed to preserve plaintiff's "'traditional privileges of selecting where, when, and how to enforce his substantive rights . . . while minimizing possible undue complexity from multi-party trials.'" Brief of Petitioner at 22, *quoting* Report of Coordinating Committee on

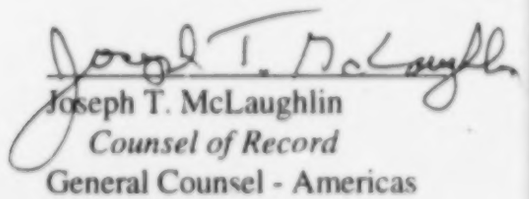
Multiple Litigation. It is not designed to expand upon those privileges by prohibiting transfers under section 1404. Transfer of cases pursuant to section 1404, where appropriate, is a normal check on plaintiffs' privilege to initially choose the forum, exercised by the district court with authority over the case to prevent such choices from needlessly burdening the parties, witnesses or the courts.

To prohibit transferee courts from exercising the power to transfer cases for trial pursuant to section 1404 would undercut the courts' ability to manage cases efficiently and effectively, encourage forum shopping by plaintiffs, increase the risk to litigants of inconsistent or contradictory verdicts and mandate possibly thousands of burdensome individual trials, or determinations of transfer motions just before trial, by courts that have had no contact with the cases for an extended period of time. Neither the language, the legislative history, nor common sense requires such a result. This Court should not impose such an inefficient allocation of scarce judicial and party resources when it is both not required by the unambiguous meaning of the statute, and

contrary to the goals of both applicable statutes and the efficient administration of justice.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.



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In The Supreme Court of the United States

October Term, 1996

Lexecon, Inc., *et al.*,
Petitioners,
v.
Milberg Weiss Bershad Hynes & Lerach,
A Partnership, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICUS CURIAE* OWENS-ILLINOIS, INC., IN SUPPORT OF RESPONDENTS

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IN THE

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OCTOBER TERM, 1996

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LEXECON, INC., *et al.*,
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A Partnership, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* OWENS-ILLINOIS, INC., IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST OF *AMICI CURIAE*

Owens-Illinois, Inc.* ("Owens-Illinois") respectfully submits this brief as *amicus curiae* in support of respondents with the consent of the parties. The letters of consent from counsel for petitioners and respondents have been filed with the Clerk of the Court.

Owens-Illinois has a significant interest in this case because it is one of the defendants in the asbestos-related personal injury litigation. All of the pending federal asbestos-related personal injury cases, which number in the thousands, have been consolidated for pre-trial proce-

* Counsel for Owens-Illinois, Inc. authored this brief in whole.

dures as MDL 875 before Judge Charles Weiner of the Eastern District of Pennsylvania. That large and complex MDL is working extremely well. Judge Weiner has resolved—and continues to resolve—enormous numbers of these cases as part of his continuing supervision of the consolidated pre-trial procedures in MDL 875.

Owens-Illinois has been an active participant in all stages of the pre-trial procedures in MDL 875. Because of this experience, Owens-Illinois believes that its views on the proper scope of consolidated proceedings in a multidistrict action may be helpful to the Court.

SUMMARY OF ARGUMENT

Owens-Illinois believes the position articulated by respondents is correct, but will leave it to them to make the case for maintaining the long-accepted practice of allowing MDL transferee courts to retain jurisdiction pursuant to 28 U.S.C. §§ 1404 & 1407. Owens-Illinois respectfully submits that regardless of how this Court determines the question presented in this case, it should do nothing to jeopardize the transferee courts' ability to resolve cases in multidistrict consolidations such as MDL 875. Transferee courts should retain broad supervisory powers over all pretrial matters, which include discovery, dispositive motions, *and* settlement negotiations.

ARGUMENT

SUPERVISION OF SETTLEMENT NEGOTIATIONS IS A CRITICAL ASPECT OF "COORDINATED OR CONSOLIDATED PRETRIAL PROCEDURES" UNDER 28 U.S.C. § 1407.

As this Court considers the scope of 28 U.S.C. § 1407, it is crucial to recognize that "coordinated or consolidated pretrial procedures" include more than discovery and motions practice. Indeed, one of the most important benefits of multidistrict consolidation under § 1407 is the potential for resolution of claims without trial. Multi-

district litigation brings all of the parties and cases together under the umbrella of a single docket, creating enhanced opportunities for settlement discussions. It also allows the transferee court to establish sufficient familiarity with the issues for active supervision of settlement negotiations and review of dispositive motions. Although the question before the Court in this case does not directly involve those important functions, this Court should be cautious to avoid casting doubt on the authority of transferee courts to retain jurisdiction over cases in settlement negotiations and to oversee pretrial resolution of multidistrict claims.

The asbestos-related personal injury cases consolidated in MDL 875 illustrate the benefits of active court supervision of settlements in multidistrict litigation. Under Judge Weiner's direction, approximately 40,000 cases have been removed from the active federal asbestos docket during the pendency of MDL 875. *In re Asbestos Prods. Liab. Litig. (No. VI)*, No. MDL 875, 1996 WL 539589, *1 (E.D. Pa. Sept. 16, 1996). Approximately 65% of all pending federal asbestos cases have been resolved as active matters as to all parties. *Id.*

These cases were not resolved by class action settlements of the type rejected by this Court last term in *Amchem Prods., Inc. v. Windsor*, —— U.S. ——, 65 U.S.L.W. 4635 (1997). Rather, they were resolved through the active and often innovative efforts of Judge Weiner within the context of the pretrial proceedings.

For example, early in the pendency of MDL 875, Judge Weiner issued Administrative Order No. 3 (a copy of which is attached to this brief as Appendix A). That order provides a coordinated series of procedures for "review, settlement and/or further action in this cases." Though expressly warning that it was "not a substitute for broad-based negotiations designed to resolve entire blocks of cases," the court's mechanism is designed to give priority to claimants with the most serious injuries.

Administrative Order No. 3 requires voluntary production of detailed information about the most serious claims and expedited analysis by the defendants of those claims. The order also requires at least 30 days of good faith settlement negotiations, which are to be closely supervised by the court. (The order even details some of what each party must bring to the table in order to ensure that negotiations are actually conducted in good faith.) Appendix A at ——.

Judge Weiner also has instituted procedures which have led to block settlements. These have included plaintiff and defendant steering committees and a process by which test areas were sampled and data were examined by experts chosen by the parties. Thereafter, this process became a vehicle which is now in use in every jurisdiction across the country. *See In re Asbestos* at *1.

Furthermore, in suggesting cases for remand, Judge Weiner has deferred consideration of punitive damages. In entering orders suggesting remand, Judge Weiner notes that "the issue of punitive damages must be resolved at a further date with regard to the entire MDL action," and he therefore severs any claims for punitive or exemplary damages and retains those claims within MDL 875. (An example of such a ruling is attached to this brief as Appendix B.)

These rulings, among others, have made important contributions to the rapid and equitable resolution of federal asbestos cases. Judge Weiner has established procedures ensuring that the most serious cases go first and, by deferring punitive damages, he has helped to protect the ability of future plaintiffs to collect for their injuries. Moreover, Judge Weiner has established a detailed and effective structure for settlement discussions that has resolved large numbers of claims and helped clear asbestos dockets. As Judge Weiner has noted, his court's processing of MDL 875 "has resulted in the removal of 7-8,000 cases per year from the federal court dockets, while at the same time, these courts have been freed of the morass caused by the

mass of asbestos case filings and able to transact other important court business." *In re Asbestos* at *2. Indeed, "[f]or the first time, the case resolution numbers are exceeding new filings." *Id.*

These aspects of Judge Weiner's stewardship of MDL 875 may not directly involve discovery or motions, but they are no less important elements of "coordinated and consolidated pretrial proceedings" within the meaning of § 1407. Regardless of whether a case must return to its district of origin for the actual *trial*, settlement negotiations can—and often should—be conducted in the transferee court.

While the experience of MDL 875 makes clear the utility of such an interpretation, the plain language of § 1407, the legislative history of the statute, the rules of the JPML, and subsequent judicial and scholarly interpretation erase any doubt that the transferee district courts have the *authority* to oversee settlement negotiations and to dispose of cases prior to trial. First, this authority was explicitly provided by Congress. Section 1407 directs that the transferee court should remand the case "unless it shall have been previously terminated." As the Third Circuit has noted, this language "suggests that Congress contemplated that transferee courts would dismiss cases in response to dispositive motions." *In re Donald J. Trump Casino Sec. Litig.*, 7 F.3d 357, 367-68 (3d Cir. 1993), *cert. denied*, 510 U.S. 1178 (1994).

Second, such authority was referenced in the legislative history. *See, e.g.*, H.R. Rep. No. 1130, 90th Cong., 2d Sess. 3, *reprinted in* 1968 U.S.C.C.A.N. 1898, 1900 (the transferee court would have the authority to "render summary judgment" and supervise all other "procedure[s] which precede the trial of an action"). Third, this authority is explicitly referenced in JPML Rule 14(a), which provides that "[A]ctions terminated in the transferee district court by valid judgment, including but not limited to summary judgment, judgment of dismissal and

judgment upon stipulation, shall not be remanded by the Panel and shall be dismissed by the transferee district court."

Fourth, the courts considering this issue have found that transferee courts have the authority to dispose of cases as part of their "coordinated pretrial procedures." *See, e.g., In re Temporomandibular Joint (TMJ) Implants Prods. Liab. Litig.*, 97 F.3d 1050, 1055 (8th Cir. 1996) (transferee court has authority to enter dispositive orders terminating cases); *Trump*, 7 F.3d at 367 (same). Finally, commentators have noted that the transferee judge assigned to multidistrict litigation possess all pretrial powers over the transferred actions that the original district court could exercise, including the authority to decide motions for judgment approving a settlement, for dismissal, for judgment on the pleadings, for summary judgment. Stanley A. Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts*, 78 F.R.D. 575, 578-83 (1978); Manual for Complex Litigation (Third) § 31.132 (1995) ("the transferee court may terminate actions by ruling on motions to dismiss or for summary judgment or pursuant to a settlement").

Thus, the law as it presently stands is clear—transferee judges have the authority to oversee broad-based settlement negotiations of the type presently being supervised by Judge Weiner in MDL 875. If this Court were to suggest that such supervision were not part of the "coordinated or consolidated pretrial procedures" contemplated in § 1407, it could bring the progress made by Judge Weiner and other transferee judges to a halt. In the case of MDL 875, it could relegate the disparate transferor courts to the fate of state court judges across the country, each of whom is destined to fight a decentralized, uncoordinated battle to bring order to its own asbestos docket.

CONCLUSION

This Court should affirm the judgment permit transferee courts to continue supervising settlement negotiations and resolving cases prior to trial pursuant to 28 U.S.C. § 1407.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

LEGEON INC., *et al.*,

Petitioners,

v.

MELBERG WEISS BERSHAD HYMES & LERACH, A PARTNERSHIP, *et al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
For the Ninth Circuit

BRIEF *AMICI CURIAE* OF AMERICAN COUNCIL OF LIFE INSURANCE, THE NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, AND THE AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF RESPONDENTS

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BRIEF *AMICI CURIAE* OF AMERICAN COUNCIL OF LIFE INSURANCE, THE NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, AND THE AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICI

The *amici* are trade associations representing the interests of many of the life and property and casualty insurers in the United States.[1] Specifically, the American Council of Life Insurance is the largest life insurance trade association in the United States, representing the interests of more than 580 member life insurance companies. These companies currently underwrite 90.9 percent of the life insurance in force in the United States.

The National Association of Mutual Insurance Companies (hereinafter "NAMIC") is a national trade association representing the interests of nearly 1200 property and casualty insurance companies that range from among the largest to the smallest in North America. NAMIC is the largest property and casualty trade association in North America, both in number of member companies and the amount of business underwritten. Together NAMIC member

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1 Counsel for both the petitioners and the respondents have consented to the filing of this brief. Their consents are on file with the Clerk.

Pursuant to Rule 37.6, *amici* state that counsel for a party did not author this brief in whole or in part and no person or entity, other than *amici* and their members, made a monetary contribution to the preparation or submission of this brief.

companies underwrite approximately 30% of the property and casualty insurance business in the United States.

The American Insurance Association (hereinafter "AIA") is a national trade association representing more than 300 companies writing property and casualty insurance in every state and jurisdiction of the United States. AIA maintains seven regional offices, and retains legislative counsel in every state. AIA member companies underwrite $58 billion a year in direct written premiums. AIA members hold 48% of the country's market share for commercial multi-peril coverage and 39% of the products liability insurance.

The *amici* have a significant interest in the resolution of the question presented by this case. Their members have been and will be parties to complex, multi-forum legal disputes subject to transfer under 28 U.S.C. § 1407(a). In addition, members of the *amici* insure other individuals and entities that have been and will be parties to cases transferred under section 1407(a), and therefore have been and may be required to indemnify these parties for their liability and/or for the costs of defense. Indeed, in practice, both the underlying liabilities and the costs of litigation in complex multi-forum disputes often are ultimately borne by insurers such as the members of the *amici*. Accordingly, both as parties to litigation and as insurers of parties, members of the *amici* have an interest in the fair and efficient resolution of cases transferred under section 1407(a), and thus support the existing practice of allowing transferee judges the discretion to conduct consolidated trial and post-trial proceedings in appropriate cases.

SUMMARY OF ARGUMENT

As respondents demonstrate, the relevant statutory language and legislative history supports the authority of

multidistrict litigation ("MDL") transferee judges to consider and rule upon motions made pursuant to 28 U.S.C. § 1404(a), and thereby to determine whether MDL cases should be consolidated for trial and post-trial purposes. *Amici* will not repeat those arguments here. Instead, this brief will address two points: (1) that consolidation of MDL cases for trial and post-trial purposes can have significant efficiency and fairness benefits; and (2) that such consolidation does not impinge upon any legitimate interest plaintiffs have in their choice of forum.

Sixty-five years ago, prior to the age of massive multi-forum litigation, Professor Chafee recognized that fewer lawsuits sometimes can do greater justice than more lawsuits:

> The King of Brobdingnag gave it for his opinion that, "whoever could make two ears of corn, or two blades of grass to grow upon a spot of ground where only one grew before, would deserve better of mankind, and do more essential service to his country than the whole race of politicians put together." In matters of justice, however, the benefactor is he who makes one lawsuit grow where two grew before.

Zechariah Chafee, Jr., *Bills of Peace with Multiple Parties*, 45 Harv. L. Rev. 1297 (1932).[2]

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[2] The subject of Prof. Chafee's article was the "bill of peace in equity," a mechanism by which "[q]uestions of law or fact which would otherwise be tried over and over can . . . be determined once for all in a single proceeding." *Id.* According to Prof. Chafee, "[t]his avoidance of multiplicity of suits saves the parties from needless expense and vexation, economizes the

For the past 30 years, the MDL system, as implemented by the Judicial Panel on Multidistrict Litigation ("JPML") and the district court judges to whom the JPML has transferred MDL cases, has been such a benefactor of justice, efficiently and fairly resolving approximately 60,000 individual lawsuits through a far smaller number of consolidated proceedings. *Judicial Business of the United States Courts: 1996 Report of the Director* at 29. The majority of these lawsuits have been resolved without the necessity for trial. A small number of these lawsuits, however, have required trials on the merits and post-trial proceedings, and in some portion of such cases these trials and post-trial proceedings have been conducted by transferee judges, either by consent of the parties or because of rulings on section 1404(a) motions. Undoubtedly, in appropriate cases the consolidation for trial and post-trial purposes of MDL cases can have substantial efficiency and fairness benefits, conserving the valuable resources both of the parties and the federal judicial system, resolving cases more quickly, and at the same time avoiding inconsistent results. No one, including petitioners, seriously disputes the enormous benefits that can flow from such consolidation. Indeed, the MDL system -- a system conceived of and implemented by some of this nation's most respected jurists -- has operated so well and so fairly that it has required virtually no supervision by the federal appellate courts in its almost 30 years of existence.

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time of judges and jurymen, and frees the dockets for the affairs of other litigants." *Id.* Much the same can be said for consolidation of cases for trial and post-trial purposes under the current MDL system, and indeed has been said, as discussed below in Part I of the Argument.

In the face of the impressive track-record of the MDL system and the acknowledged benefits of consolidation, petitioners attack the subjective motives of the district court judges that are hand-picked by the JPML to preside over MDL cases. Supported by the views of only a single federal court judge, Judge Kozinski, petitioners contend that the MDL system somehow deprives plaintiffs of their "choice of forum" because transferee judges allegedly develop "proprietary feelings" towards the MDL cases assigned to them, and express these feelings by systematically making incorrect rulings on section 1404(a) transfer motions. *See* J.A. at 58; Pet. Br. at 11.

This approach to the question presented is more akin to psychoanalysis than legal analysis. The notion that transferee judges have used section 1404(a) to engage in an illegitimate power grab is not supported by anything in the record before this Court. Moreover, the available statistical evidence and the decisions of transferee judges themselves demonstrate that transferee judges are fully capable of rendering fair and correct rulings on section 1404(a) motions, and that transferee judges frequently relinquish control of MDL cases and return them to the transferor courts in which they originally were filed.

Once the myth of the "conspiracy of the transferee judges" is put to rest, petitioners' purported policy arguments crumble. While it is true that plaintiffs generally have *some* interest in having their claims tried in their chosen federal district, this interest does not rise to the level of an unqualified right. As this Court has made clear, a plaintiff can be required to try its claim in some other district where venue is proper if the plaintiff's interest in its chosen forum is outweighed by other equally legitimate interests, including the interest of judicial economy. This is the balancing process in which a district court judge is required to engage

when ruling upon a section 1404(a) motion. Although plaintiffs have an interest in having *some* Article III judge engage in this balancing, plaintiffs have no legitimate interest in having it done by any *particular* Article III judge. And in the MDL context, an Article III "transferee" judge often is better equipped to engage in this balancing process than an Article III "transferor" judge. Thus, whatever legitimate interest plaintiffs have in their choice of forum is fully protected by the MDL system as it has always operated.

ARGUMENT

I

TRANSFEREE COURTS MUST BE PERMITTED TO CONSIDER AND RULE UPON SECTION 1404(a) MOTIONS IN ORDER TO ACHIEVE THE FULL EFFICIENCY AND FAIRNESS BENEFITS OF THE MDL SYSTEM

A. Consolidation Of MDL Cases Before A Single Court For Purposes Of Trial And Post-Trial Proceedings Can Have Substantial Efficiency And Fairness Benefits

In the almost 30 years since the enactment of section 1407, the MDL system has been a remarkable success. The JPML -- a panel of some of the nation's most distinguished and experienced jurists designated by the Chief Justice pursuant to section 1407(d) -- has transferred approximately 100,000 individual lawsuits for coordinated or consolidated pretrial proceedings, for an average of over 3,000 lawsuits per year. *Judicial Business of the United States Courts: 1996 Report of the Director* at 29. These 100,000 individual

lawsuits have been consolidated into 737 MDL matters, for an average of 136 individual cases per MDL matter.[3]

The legal disputes that receive MDL treatment are among the most difficult to resolve and most expensive to litigate. They are the types of legal disputes that, in the absence of MDL treatment, could bankrupt the parties solely through the cost of litigation, lead to inconsistent and inequitable results, overrun the dockets of the federal courts and, because of the delay engendered, deprive deserving plaintiffs of any recovery for extended periods of time.[4] For

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[3] *Amici* have lodged with the Court ten copies of an August 11, 1997 printout of the "Multidistrict Automated Tracking System -- Citations Summary," a computerized database maintained by the JPML and publicly available from the JPML Clerk's office. This document lists the cases which have been assigned "MDL" matter numbers by the JPML, and for each such matter number indicates the caption of the matter, what actions have been taken by the JPML with respect to that matter, what type of litigation the matter relates to, and -- for cases transferred under section 1407(a) -- the transferee court and judge. According to this document, the JPML has consolidated cases by granting section 1407 motions to transfer in 737 MDL matters, and has refused consolidation by denying such motions in 300 matters.

[4] Numerous commentators have recognized the enormous costs and inequities that may result from uncoordinated complex multi-forum litigation. *See, e.g.*, William W. Schwarzer, Alan Hirsch & Edward Sussman, *Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute to Permit Discovery Coordination of Large-Scale Litigation Pending in State and Federal Courts*, 73 Tex. L. Rev. 1529, 1530 (1995) ("[A]ll large-scale litigation has one common consequence: duplicative activity that wastes scarce resources, clogs court dockets, causes delays, and often produces divergent decisions on nearly identical claims, leading to frustration of victims' rights to compensation, excessive transaction costs, and unfairness and uncertainty."); American Law Institute, *Complex Litigation:*

example, among the largest cases handled by the MDL have been the multi-district disputes concerning, *inter alia*, "Agent Orange" (MDL No. 381), the "Dalkon Shield" (MDL No. 211), and silicon breast implants (MDL No. 926) -- cases that in the absence of MDL treatment threatened to bury the dockets of the federal district courts.

Scholars and other commentators have offered unanimous praise for the MDL system, and the substantial fairness and efficiency benefits attributable to MDL consolidation. *See, e.g.*, Joan Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and*

Statutory Recommendations and Analysis at xviii (1994) (hereinafter ALI, *Complex Litigation*) (foreword of Prof. Hazard, stating that "[i]t is common ground that these types of litigation involve extraordinary burdens on the court systems, both federal and state; high 'transaction costs' in the form of lawyer's fees and related expenses; and serious risk of inconsistent dispositions of claims by claimants who are similarly situated"); *id.* at 16-17 ("[T]he most striking problem caused by complex litigation is its enormous cost. That cost cannot be measured precisely, but every indication is that it is staggering."); George T. Conway III, Note, *The Consolidation of Multistate Litigation in State Courts*, 96 Yale L.J. 1099 (1987) ("[T]he expense of mass tort litigation, which commonly involves dozens of closely related lawsuits brought by citizens of many states, has reached staggering levels. The cost of litigating these claims often exceeds the sums that are ultimately paid to plaintiffs."); Thomas D. Rowe, Jr. & Kenneth D. Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 U. Pa. L. Rev. 7, 15 (1986) ("The problems [posed by multiforum complex litigation] are many," and include "dangers of bankruptcy of a defendant after several large judgments but before other plaintiffs' claims can be satisfied, and possible unfairness in connection with multiple awards of punitive damages," as well as "delay and additional expense for the parties.").

in Multidistrict Litigation, 135 U. Pa. L. Rev. 595, 596 (1987) (The JPML "has been functioning effectively for almost 20 years. Indeed, 'multidistrict consolidation for pretrial proceedings has become an essential factor in the federal courts' ability to carry their increasing burden of complex litigation.'") (citation omitted); David F. Herr, *Multidistrict Litigation* at xix (1986) ("The result of the Panel's activities has been litigation that is both more manageable by the courts and more expeditiously resolved for the litigants."); Stanley A. Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts*, 78 F.R.D. 575, 585 (1978) ("Through creative use of their broad powers, transferee judges have developed salutary solutions to many of the staggering problems associated with complicated and intricate multidistrict litigation. In so doing, transferee judges have contributed immeasurably to the public welfare and to the capacity of the federal judiciary to carry its ever increasing burden of litigation.").

Although a dispute has arisen among scholars and commentators (although not, until Judge Kozinski's dissent below, within the federal judiciary) concerning whether transferee judges have statutory authority to consolidate MDL cases for trial and post-trial purposes pursuant to section 1404(a), there is widespread *agreement* that in appropriate circumstances the consolidation of MDL cases for trial and post-trial purposes can have enormous practical benefits. *See, e.g.*, Schwarzer et al., *supra* note 4, at 1535 (precluding transferee court from consolidating cases for trial "bar[s] [the court] from invoking an effective procedure -- the early severance and consolidated trial of threshold and potentially dispositive issues common to the litigation."); Blake M. Rhodes, Note, *The Judicial Panel on Multidistrict Litigation: Time for Rethinking*, 140 U. Pa. L. Rev. 711, 731 (1991) ("The 1407-1404(a) combination did not develop

arbitrarily and parties do not consent to trial in the transferee forum capriciously. Trial in the transferee court is ordered or consented to because it promotes efficient judicial administration and/or is in the interest of litigants. Certainly consolidated trial of every multidistrict litigation is not warranted, but it is often advantageous, and on occasion imperative."); Conway, *supra* note 4, at 1103 (consolidation for trial "fosters fairness in adjudication by promoting consistent results in related case" and "enhances judicial economy by eliminating the delay and duplication of effort that would result if each transferred case were remanded to its original district for trial."); Note, *The Judicial Panel and the Conduct of Multidistrict Litigation*, 87 Harv. L. Rev. 1001, 1033 (1974) ("When there are substantial common issues, consolidated trial produces economy for the parties and the courts, utilizes the expertise of the transferee judge, and guarantees consistent results."); Herr, *supra*, at 213 ("One very important means of resolving transferred cases in the transferee court is transfer of the cases to that court for trial.").

The significance of consolidation through the use of section 1404(a) goes beyond merely the question of where the trial or trials of the consolidated cases will take place. Keeping related cases in a central forum for trial, post-trial proceedings, and appeal significantly increases the likelihood of resolution through settlement during each of these phases. As most MDL cases involve multiple claims against a single defendant or group of defendants, a settlement that does not bankrupt the defendants and that equitably distributes any payments to the many claimants often can be achieved only through a centralized negotiation process. Dispersal of such cases back to numerous different forums makes negotiated global resolutions significantly more difficult to achieve, thereby delaying and increasing the transaction costs of such resolutions.

Thus, the benefits to both parties and the judicial system of consolidation of MDL cases -- including consolidation for trial and post-trial purposes -- are significant and undisputed. Indeed, even petitioners recognize "the benefits of transfers for all purposes, including trial." Pet. Br. at 29.

B. Contrary To Petitioners' Suggestion, These Efficiency And Fairness Benefits Cannot Be Obtained Unless Transferee Courts Are Permitted To Consider And Rule Upon Section 1404(a) Motions

Petitioners contend that the admitted "benefits of transfers for all purposes, including trial," can be achieved even if transferee courts are not permitted to consider and rule upon section 1404(a) motions. Pet. Br. at 29. Petitioners suggest that these same benefits can be achieved merely by "ask[ing] the district court where the case was filed for a section 1404 transfer for all purposes, including trial." *Id.* This suggestion, however, ignores the realities of multi-district litigation.

The typical MDL case begins with the filing of numerous similar lawsuits (usually raising nearly identical allegations of tortious conduct against a common defendant or group of defendants) in numerous different judicial districts, where they are assigned to numerous different judges. Any attempt to have these cases consolidated before a single judge -- other than through the MDL process -- raises usually insurmountable collective action problems. Such an attempt would require the coordinated filing by litigants in each of the numerous cases of section 1404(a) motions seeking transfer to a single agreed-upon district. All of the motions would then need to be granted by the numerous different judges before whom they were filed. Such a process easily could break down at either step due to

a lack of cooperation among the parties or a lack of coordination among the judges.

Outside of the MDL context, such a substantial coordinated effort has been attempted only once in the history of the federal judiciary, in the *Electrical Equipment* cases. But even in that instance, the coordination was not brought about voluntarily by the parties or the judges before whom the cases initially were brought. Rather, the coordinated granting of section 1404(a) motions occurred only under the centralized leadership of the Co-Ordination Committee on Multiple Litigation appointed by Chief Justice Warren. *See* H.R. Rep. No. 90-1130 (1968), *reprinted in*, 1968 U.S.C.C.A.N. 1898, 1899; *Hearings on H.R. 8276 Before the Subcomm. No. 5 of the House Comm. on the Judiciary*, 89th Cong. 21-22 (1966).

In reality, the consolidation of MDL cases before a single court for trial and post-trial purposes cannot be achieved through the making of numerous section 1404(a) motions in numerous different district courts. Indeed, under the new regime offered by petitioners as a substitute for the system that has been used for three decades, at some point prior to trial, all of the cases consolidated pursuant to section 1407 -- sometimes numbering in the thousands -- would have to be remanded to a multitude of district courts around the country. In order to have a consolidated trial, the parties in each of these many cases would then have to make separate section 1404(a) motions in the respective transferor courts. Those transferor courts would not have been involved in other pretrial proceedings, such as discovery and dispositive motions, would not be familiar with other cases that had been part of the MDL consolidation and therefore likely would be ill-equipped to decide whether consolidation for trial makes sense and is permissible under section 1404(a). And, while some transferor judges might decide that a

section 1404(a) transfer and consolidation for trial is appropriate, others might reject that position, defeating the whole notion of consolidation of all similar cases into one unitary proceeding.

In contrast,, the transferee judge who handled the consolidated pretrial proceedings is perfectly positioned to decide the pretrial issue whether section 1404(a) transfers of the consolidated cases to a single court for purposes of trial and post-trial proceedings is in the "interest of justice." *See Lykes Bros. S.S. Co. v. Sugarman*, 272 F.2d 679, 680 (2d Cir. 1959) (question whether to grant section 1404(a) motion is "peculiarly one for the exercise of judgment by those in daily proximity to these delicate problems of trial litigation").

In short, consolidation for trial of multi-district litigation can be achieved only if transferee courts are permitted to consider and rule upon section 1404(a) motions. If this Court accepts petitioners' arguments, and deprives transferee courts of the ability to consider and rule upon section 1404(a) motions, then the significant benefits that flow from the consolidation of MDL cases for trial and post-trial purposes will be unobtainable.

II

PERMITTING TRANSFEREE COURTS TO CONSIDER AND RULE UPON SECTION 1404(a) MOTIONS DOES NOT IMPINGE UPON ANY LEGITIMATE INTEREST PLAINTIFFS HAVE IN THEIR CHOICE OF FORUM

A. Plaintiffs' Choice Of Forum Is Not A Dispositive Factor In Section 1404(a) Transfers, And Legitimately Can Be Outweighed By Interests Of Efficiency And Judicial Economy

Judge Kozinski, in his dissent below, argues that the granting by a transferee judge of a section 1404(a) motion has the effect of "denying plaintiffs the right to trial in their forum of choice." J.A. at 57. He suggests that Congress may have "thought it unfair to deny [plaintiffs] control over the place of trial [.]" J.A. at 68. And in a particularly colorful passage, he contends that "MDL courts are applying a mutated version of section 1404(a), one where a plaintiff's right to pick its venue has devolved to the significance of a tailbone or an appendix." J.A. at 71. Petitioners echo these sentiments. *See* Pet. Br. at 11-12. Thus, petitioners' arguments depend in large part upon the assertion that plaintiffs have a "right" to their chosen forum that cannot legitimately be overcome by considerations of efficiency and judicial economy. *See* Pet. Br. at 20 n.6 ("But section 1404(a), unlike section 1407(a), does not recognize judicial efficiency as a basis for a transfer. It is therefore a perversion of congressional intent to use the former to expand the later."). This assertion is demonstrably incorrect.

It is well established that plaintiffs do not have an unqualified "right" to have their claims tried in the federal

district in which those claims initially are brought. Indeed, the primary purpose of section 1404(a) is to permit transfers *even if* the plaintiff has chosen an appropriate forum. *See Ex Parte Collett*, 337 U.S. 55, 58 (1949) ("Subsection (a) was drafted in accordance with the doctrine of forum non conveniens, permitting transfers to a more convenient forum, even though the venue [of the original forum] is proper.") (*quoting* 28 U.S.C § 1404 revision notes). The "remedial purpose" of section 1404(a) is to permit "the individualized, case-by-case consideration of convenience and fairness[.]" *Van Dusen v. Barrack*, 376 U.S. 612, 622 (1964). And as this Court has recognized, district courts have broad discretion under section 1404(a) to transfer actions when the plaintiff's choice of forum is outweighed by other interests. *Norwood v. Kirkpatrick*, 349 U.S. 19, 26 (1955) ("This is not to say . . . that the plaintiff's choice of forum is not to be considered, but only that the [district court's] discretion to be exercised is broader.").[5]

Among the interests that may, for purposes of a section 1404(a) motion to transfer, outweigh the plaintiff's interest in its chosen forum is the interest of judicial economy. Indeed, in *Continental Grain Co. v. The FBL-585*, 364 U.S. 19, 26 (1960) -- a case decided prior to the enactment of section 1407 -- this Court approved the use of section 1404(a) to consolidate before a single judge cases

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5 In an analogous context, this Court held that even where *both* parties select a particular forum -- through the use of a contractual forum-selection clause -- a district court may order transfer to a different forum, and in so doing must "weigh in the balance the convenience of the witnesses and those public-interest factors of systemic integrity and fairness that, in addition to private concerns, come under the heading of 'the interest of justice.'" *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 30 (1988).

originally filed in different districts that could more efficiently be tried together:

> To permit a situation in which two cases involving precisely the same issues are simultaneously pending in different District Courts leads to the wastefulness of time, energy and money that § 1404(a) was designed to prevent.

"[T]he desire to avoid multiplicity of litigation from a single transaction" is an element that district courts properly may consider in determining whether a section 1404(a) transfer is "in the interest of justice." 15 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3854 at 439-41 (2d ed. 1986). Indeed, the lower federal courts have recognized, even outside of the MDL context, that "related litigation should be transferred [pursuant to section 1404(a)] to a forum where consolidation is feasible." *Coffey v. Van Dorn Iron Works*, 796 F.2d 217, 221 (7th Cir. 1986); *see also International Tel. & Tel. Corp. v. General Tel. & Elecs. Corp.*, 527 F.2d 1162, 1164 (4th Cir. 1975) (Where antitrust action filed in North Carolina related to antitrust action pending in Hawaii, "[j]udicial efficiency and economy suggest a transfer so that, if a violation of the antitrust laws is found, all appropriate relief may be granted in one action.").

In sum, plaintiffs do not have a "right" to have their claims tried in the federal district court in which such claims originally are filed. Rather, a plaintiff's choice of forum is merely one interest that a district court considering a section 1404(a) motion may consider. And the interest in preserving a plaintiff's choice of forum may, pursuant to the explicit text of section 1404(a), be outweighed by "the interest of justice," an interest that includes the efficient resolution of multi-district litigation through consolidation of related cases for

trial and post-trial purposes. Accordingly, the use of section 1404(a) to consolidate related cases for trial and post-trial purposes, even at the expense of plaintiffs' choice of forum, is appropriate and clearly within the discretion of a district court judge.

B. The Accusation Leveled By Petitioners And Judge Kozinski That, Because Of Their Alleged "Proprietary Feelings," Transferee Judges Systematically Make Incorrect Rulings On Section 1404(a) Motions Is Both Unsupported By The Record And Simply Incorrect

Both Judge Kozinski and the petitioners assert that MDL transferee judges are systematically granting section 1404(a) motions and thereby transferring cases to themselves for purposes of trial and post-trial proceedings in cases in which such transfers are not justified under the standards of section 1404(a). Judge Kozinski, in his dissent below, accuses his fellow Article III judges of engaging in a "remarkable power grab, " J.A. at 57, by "twisting the standards of section 1404(a) beyond recognition," J.A. at 64 n.5, such that "the traditional forum deference afforded plaintiffs disappears entirely." J.A. at 71. According to Judge Kozinski, "self-transfers are not occasional, isolated events based on an unusually strong showing of judicial economy; they are the norm." J.A. at 72. "The simple reality," he claims, "is that once a case is sucked into the MDL vortex, it seldom comes back." *Id.* In a similar vein, petitioners contend that transferee judges will "often" order transfers for trial and post-trial purposes "that could not possibly be justified under the standards of section 1404." Pet. Br. at 24. Neither petitioners nor Judge Kozinski explain why this alleged power grabbing and standard twisting should occur, other than to suggest that transferee

judges "develop proprietary feelings toward the cases entrusted to them," J.A. at 58; Pet. Br. at 11.

In large part, the notion that transferee judges are "twisting" the standards of section 1404(a) is based upon a misunderstanding of what those standards actually are. As discussed above, Judge Kozinski and the petitioners give far too much weight to the asserted "right" of plaintiffs to have their cases tried in their chosen forum, and greatly understate the weight typically given to other interests -- including the interest of judicial economy -- in the consideration of section 1404(a) motions. Consolidating related cases under section 1404(a) is not an illegitimate "twisting" of section 1404(a) standards; rather, it is an entirely appropriate attempt to avoid "the wastefulness of time, energy and money that § 1404(a) was designed to prevent." *Continental Grain Co.*, 364 U.S. at 26.

But even though transferee judges may, in appropriate cases, apply the standards of section 1404(a) and consolidate related cases for trial and post-trial purposes, there is no evidence, as suggested by Judge Kozinski, that transferee judges are doing so routinely or otherwise exhibiting "proprietary feelings" towards the MDL cases assigned to them. To begin, it is worth noting that the JPML, which itself is designated by the Chief Justice, typically assigns MDL cases only to the most highly-respected and experienced district court judges. *See* Herr, *supra*, at 173 ("The Panel undoubtedly considers the ability and reputation of a judge in determining whether to assign complex, multidistrict litigation to him or her."). Thus, the MDL transferee judges come from the cream of the judicial crop. And like all judges, they are "presumed to know the law and to apply it in making their decisions." *Walton v. Arizona*, 497 U.S. 639, 653 (1990). Judge Kozinski's suggestion that the "proprietary feelings" allegedly harbored by these judges

leads them to systematically *mis*apply the law is, on its face, rather astonishing.

Judge Kozinski reveals the weakness of his "proprietary feelings" theory through reliance upon statistics which in fact demonstrate precisely the opposite of what he claims. He notes that the JPML "has transferred 92,562 cases for consolidated pretrial proceedings," but that "[o]nly 3,508 of these -- less than four percent -- have been sent back for trial in the district where the complaint was filed." J.A. at 57. It is these statistics, he contends, that "tell the story of a remarkable power grab by federal judges who have parlayed a narrow grant of authority to conduct consolidated discovery into a mechanism for systematically denying plaintiffs the right to trial in their forum of choice." *Id.*[6]

When viewed in context, however, these figures show nothing of the kind. The relevant text of the *Judicial Business of the United States Courts: 1995 Report of the Director* at 32, the source of the statistics relied upon by Judge Kozinski, states as follows:

> Since the panel's creation in 1968, the panel has centralized 92,562 civil actions for pretrial proceedings. A total of 3,508 actions have been remanded for trial, 279 have been reassigned within the transferee districts, and 35,441 have been terminated in the transferee courts. On September 30, 1995, a total of

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6 Judge Kozinski's description of section 1407(a) as a "narrow grant of authority to conduct consolidated discovery" is itself an incorrect characterization of the scope of section 1407(a), a fact that he essentially admits later in his opinion by stating that "[i]t is true that an MDL court can dispose of the case by settlement or motion[.]" J.A. at 65.

53,334 actions were pending throughout 41 transferee district courts.

The 53,334 actions that remained pending in transferee courts as of September 30, 1995 were cases which had not yet been "terminated," i.e., they were cases that, for the most part, were still in pretrial proceedings, and therefore would not yet have been ripe for a remand to the transferor courts. *See id.* at 80, Table S-22. The only valid interpretation of these statistics is that, of the 39,228 "total terminations," 3,508 -- or almost 9 percent -- had been remanded to transferor courts for trial. But this obviously does *not* mean that the remaining 91 percent of MDL cases that were terminated in transferee courts did so because of a trial. "In reality, of course, cases gathered under Section 1407 hardly ever reach trial or return to their districts of initiation because most often they are settled in the transferee court." ALI, *Complex Litigation*, *supra* note 4, at 22. Indeed, the very same report relied upon by Judge Kozinski indicates that in 1995 only 3.2 percent of all civil cases terminated in the federal district courts reached trial, and that the remaining 96.8 percent of terminations occurred during pretrial proceedings. *Judicial Business of the United States Courts: 1995 Report of the Director* at 162, Table C-4. Thus, the fact that almost 9 percent of MDL cases were remanded to the transferor court for trial, when only 3.2 percent of *all* civil case ever reached the trial stage, indicates if anything that transferee courts *rarely* retain MDL cases for trial.[7]

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[7] Neither the yearly *Judicial Business of the United States Courts* reports nor any other available source provides precise statistics concerning how many or what percentage of MDL cases are actually tried by transferee judges, or what percentage of such trials take place as a result of the granting of a section 1404(a) motion (as opposed to pursuant to the parties' consent). Counsel for *amici* have been informed by the JPML Clerk's office that the JPML does not itself maintain such statistics.

The actual decisions of transferee courts and of the JPML also demonstrate that transferee courts do *not* routinely transfer cases to themselves for trial. Rather, transferee courts often voluntarily relinquish control of MDL cases back to transferor courts. *See, e.g., In re Taxable Municipal Bond Sec. Litig.*, MDL No. 863, 1995 WL 637822, at *2 (E.D. La. Oct. 30, 1995) (transferee judge concludes that "[his] role in the litigation has reached an end and that the goal of judicial economy, as well as the convenience of the parties and witnesses and the interests of justice, would best be served by transferring these few remaining claims back to the transferor districts both for ruling on dispositive pretrial motions and trial"); *In re Lower Lake Erie Iron Ore Antitrust Litig.*, MDL No. 587, 1994 WL 114904 (E.D. Pa. Mar. 29, 1994) (granting plaintiffs' motion for a suggestion of remand to the JPML so that the issue of plaintiffs' damages could be tried before the transferor court); *In re A. H. Robins Co., "Dalkon Shield" IUD Prods. Liab. Litig.*, 505 F. Supp. 221, 221-22 (J.P.M.L. 1981) ("This litigation has grown to include over 971 actions of which about 300 have been settled and dismissed in the transferee district and approximately 441 have been remanded by the Panel to their respective transferor courts following receipt of suggestion of remand from Judge Theis [the transferee judge]."); *In re King Resources Co. Sec. Litig.*, 458 F. Supp. 220 (J.P.M.L. 1978) (upon transferee judge's suggestion of remand, JPML remands actions to transferor court).

Thus, both the statistical evidence and the reported cases demonstrate that transferee judges do not routinely exhibit any illegitimate "proprietary feelings" towards the

MDL cases assigned to them. Rather, at the conclusion of pretrial proceedings, transferee judges often send MDL cases back to the transferor courts in which they originally were filed. Neither Judge Kozinski nor the petitioners have pointed to any evidence to the contrary. Significantly, despite Judge Kozinski's contention that transferee courts have "twist[ed] the standards of section 1404(a) beyond recognition," J.A. at 64 n.5, neither he nor the petitioners have pointed to a single case -- other than the case presently before this Court -- in which a transferee judge allegedly misapplied the standards applicable to a section 1404(a) motion.

Accordingly, absolutely no evidence has been presented to this Court -- and none exists -- that, as petitioners contend, transferee judges "often" order transfers for trial and post-trial purposes "that could not possibly be justified under the standards of section 1404." Pet. Br. at 24. To the contrary, all of the evidence indicates that transferee courts do not display any illegitimate "proprietary feelings" towards the MDL cases they handle, and that they only transfer MDL cases to themselves under section 1404(a) for trial and post-trial purposes in a relatively few instances, and only when such transfers are in the "interest of justice."

CONCLUSION

The efficiency and fairness benefits of consolidation of complex multi-district litigation -- including consolidation for trial and post-trial purposes -- are clear and undisputed. These benefits are available under the MDL system as it has been implemented by the JPML and the transferee judges for the past 30 years, but would be undermined if transferee judges are not permitted to consider and rule upon section 1404(a) motions. The Article III judges who act as transferee judges are fully equipped to render fair and appropriate rulings on section 1404(a) motions, and are in the best position to reach the appropriate balance between plaintiffs' choice of forum and other relevant interests, including the interest of judicial economy. Accordingly, the decision below should be affirmed.

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STATEMENT OF INTEREST

Eli Lilly and Company ("Lilly") is a research-based pharmaceutical company devoted to the development of safe and effective drugs for the treatment of serious medical conditions. Lilly's products include drugs for the treatment of mental illness, such as the antidepressant Prozac®, infectious diseases, such as the antibiotic Keflex®, and metabolic diseases, such as Humulin®, human insulin used for the treatment of diabetes. On average, Lilly's products each require an investment of 350 million dollars and 10 years of testing before they are brought to market. The nature of Lilly's business inevitably results in its involvement in litigated proceedings in the federal district courts, a number of which have been appropriate for multidistrict treatment under 28 U.S.C. § 1407. Chief among these are patent litigations (*see, e.g., In re Recombinant DNA Patent and Contract Litigation*, MDL 912) and product liability litigations (*see, e.g., In re Prozac Products Liability Litigation*, MDL 907). In this regard, the long-standing federal practice under which some or all of the related cases have been "self-transferred" for trial to the court administering the multidistrict litigation has been a source of considerable economy in and a major benefit of such multidistrict proceedings.[1]

Lilly's immediate interest in § 1407 proceedings arises out of its human insulin business. Lilly was the first company to bring to the market a safe and steady supply of human insulin created using "recombinant DNA" technology. The

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[1] Pursuant to S. Ct. R. 37(6), *amicus curiae* Eli Lilly and Company state that the listed counsel authored the instant brief in whole and that no person or entity other than Eli Lilly and Company made a monetary contribution to the preparation or submission of the brief. Written consent to the filing of this brief has been obtained from the parties and is lodged herewith.

Regents of the University of California ("UC"), Lilly's unsuccessful adversary in a recently concluded patent infringement litigation involving Lilly's human insulin product, has filed a brief, as *amicus curiae,* in the above captioned appeal in support of petitioner. In so doing, UC has mounted a collateral attack on the judgment of a different court of appeals which is not now before this Court and in which UC failed to raise in a timely fashion the issue now before this Court. Because the interests of UC are not those of a disinterested state institution, Lilly submits this *amicus* brief in part to respond to the points raised by UC.

As a litigant in the federal courts, particularly in cases involving complex technological and legal issues, Lilly also has a broader interest in ensuring that courts apply the multidistrict litigation transfer statute in a way which is both consistent with 28 U.S.C. § 1407 *and* best serves the interests of justice by promoting judicial economy. It is Lilly's position that the Judicial Panel on Multidistrict Litigation's ("J.P.M.L.") rule allowing "self transfer" by the § 1407 transferee court is entirely consistent with both the text and legislative history of 28 U.S.C. § 1407 and serves such interests of justice. Indeed, contrary to UC's assertions, the recently concluded litigation between UC and Lilly graphically illustrates the proper functioning of the multidistrict litigation system, as envisioned by Congress, by disposing of unmeritorious claims in the most efficient and expeditious manner possible.

SUMMARY OF ARGUMENT

The 11th Amendment concerns raised by *amicus* UC have no bearing on the issues raised in this case. As will be discussed below, the 11th Amendment immunity simply does not apply where a state is a willing plaintiff in federal court.

Moreover, in cases where a state is a defendant, the 11th Amendment immunity would preclude the entire litigation, unless waived or abrogated by Congress, regardless of whether or not the litigation was consolidated by the J.P.M.L. for pretrial proceedings. Finally, even if the 11th Amendment were somehow implicated by a § 1407 transfer, UC fails to explain how its sovereign immunity would have been preserved if the transferor court decided the transfer motion under 28 U.S.C. § 1404(a) rather than the § 1407 transferee court.

Furthermore, and contrary to the protestations of petitioner and UC, the plain language of 28 U.S.C. § 1407, the accompanying House Report, and the rules of the J.P.M.L. all allow a § 1407 transferee court to transfer the case for trial to the multidistrict venue pursuant to 28 U.S.C. § 1404(a). Indeed, the legislative history for § 1407 demonstrates that Congress specifically intended that such "self-transfers" pursuant to § 1404 would be available for transferring cases to the multidistrict venue for trial.

Finally, even if this Court holds that "self-transfer" is inconsistent with § 1407(a), the Court should not apply its decision retroactively pursuant to *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971), for the following reasons. First, the Court's decision would establish a new principle of law as it overrules clear past precedent on which litigants have relied. Second, the retroactive application of the Court's decision would retard judicial economy in conflict with the very purpose underlying § 1407. Third, the inequity and hardship of retroactive application would be particularly severe by requiring the reversal of a full and fair trial in a judicial district where the litigation could have been brought merely because the wrong judge decided a pretrial transfer motion.

ARGUMENT

I. ELEVENTH AMENDMENT CONCERNS ARE NOT IMPLICATED BY THE ISSUES RAISED BY THIS CASE AND SHOULD HAVE NO BEARING ON THE DECISION OF THIS COURT

In its *amicus* brief, UC seeks to portray itself as a helpless state litigant whose sovereign immunity has been swept away by a district court's flawed application of 28 U.S.C. § 1407 and § 1404. In truth, concepts of sovereign immunity were not implicated in the UC case because UC initiated the lawsuit of which it now complains by voluntarily entering the federal court system and *suing* Lilly for patent infringement. The district court's correct application of §§ 1404 and 1407 allowed the court with the greatest understanding of the complex technology at issue to preside over the trial, under circumstances where the convenience of the parties did not dictate a contrary choice of forum.

A. PROCEDURAL BACKGROUND

In *The Regents of the University of California v. Eli Lilly and Co.*, 39 U.S.P.Q. 2d 1225 (S.D. Ind. 1995), *aff'd in part*, No. 96-1175, 1997 U.S. App. LEXIS 18221 (Fed. Cir. July 22, 1997), UC sued Lilly in the Northern District of California for allegedly infringing two patents. 1997 U.S. App. LEXIS at *2. The J.P.M.L. transferred the case to the United States District Court for the Southern District of Indiana pursuant to 28 U.S.C. § 1407 for coordinated pretrial proceedings with several other cases involving closely related technology and issues. *Id.* at *7. As in the instant appeal, rather than remanding the case to the Northern District of California, the district court pursuant to 28 U.S.C. § 1404(a) transferred the case for trial to the Southern District of Indiana based

primarily on considerations of judicial economy and the fact that the convenience of the parties and witnesses did not dictate a contrary forum.[2] After a trial on the merits, the district court found that the two patents at issue were either invalid or not infringed by Lilly. *UC v. Lilly*, 39 U.S.P.Q.2d at 1258.

On appeal, the Federal Circuit affirmed the district court's decision regarding the propriety of the § 1404 transfer, explaining that "in a case such as this in which several highly technical factual issues are presented and the other relevant factors are in equipoise, the interest of judicial economy may favor transfer to a court that has become familiar with the issues." 1997 U.S. App. LEXIS at *14.[3] The Federal Circuit, however, did *not* reach the specific issue now before this Court because UC *waived* this argument by failing to raise it in its opening brief. *Id.* at *14-15. Furthermore, the Federal Circuit affirmed the district court's judgment that the two patents at issue were either not infringed or invalid. *Id.* at *51.

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[2] The district court found that (1) it had already gained an understanding of the complex technical issues involved in the case and it would be a waste of judicial resources to have another court duplicate this effort, (2) judicial efficiency heavily favored transferring the action due to the trial court's growing familiarity with such issues, and (3) that the center of the accused infringing activity was located in the multi-district venue. *In re Recombinant DNA Technology Patent and Contract Litigation*, 30 U.S.P.Q. 2d 1881, 1902 (S.D. Ind. 1994).

[3] The convenience of the parties is also advanced by having a judge with such familiarity decide the substantive issues at trial.

B. UC HAS NO LEGITIMATE ELEVENTH AMENDMENT CONCERNS

UC contends that "self-transfer" by a § 1407 transferee court deprives a sovereign of its right to select a forum for its litigation and is thereby inconsistent with the Eleventh Amendment to the Constitution. (UC *amicus* Br. at 4-6.) This argument, however, flows from UC's incorrect view that principles of sovereign immunity are somehow implicated where a state is a *willing plaintiff* in federal court. Not only is UC's novel theory directly contradicted by the jurisprudence of this Court, but it subverts the very policies underlying the 11th Amendment. As will be discussed below, once a state voluntarily enters the federal court system by *suing* another party, it subjects itself to the same rules and statutes that apply to all other litigants. Accordingly, principles of sovereign immunity have no bearing on the particular question raised by this case and should not be considered

The Eleventh Amendment embodies the Constitutional policies that "each State is a sovereign entity in our federal system;" and that "it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1119 (1996). For this reason, the Eleventh Amendment prohibits citizens of another state, or of the same state, from *suing an unconsenting state* in federal court. The sovereignty of the State of California, however, cannot be violated when, as in the *UC v. Lilly* case, the state itself purposefully chooses to bring suit in federal court. *See United States v. Peters*, 9 U.S. 115, 139 (1809) (Marshall, J.) (stating that the Eleventh Amendment simply provides that no suit shall be prosecuted against a state and has no affect on suits brought by states against other parties); *UC v. Lilly*, 1997 U.S. App. LEXIS at *11 ("This is because the Eleventh Amendment applies to suits 'against' a

state, not suits by a state."); *In re the Regents of the Univ. of Cal.*, 964 F.2d 1128, 1134 (Fed. Cir. 1992)(holding that "[t]he Eleventh Amendment is not designed to give procedural advantage to State litigants, but to shield States from unconsented actions against them"). The Federal Circuit specifically stated in the recently concluded *UC v. Lilly* litigation, "we do not believe that the [Supreme] Court has ever so construed the Eleventh Amendment" to apply to situations where the state is a willing plaintiff. 1997 U.S. App. LEXIS at *11. The cases cited in the UC's *amicus* brief involve situations where the state was the defendant, *not* the plaintiff.[4] Moreover, rather than addressing the effect of the 11th Amendment immunity on transfers under §§ 1404 and 1407, UC's cited authority pertains to the level of intent necessary for a state to effectuate a *waiver* of its 11th Amendment immunity.[5]

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[4] *See e.g., Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996) (suit against State of Florida); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984) (suit against officials of State of Pennsylvania); *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 307 (1990) (suit against entity created by States of New York and New Jersey); *Idaho v. Coeur d'Alene Tribe of Idaho*, 117 S. Ct. 2028, 2035 (1997) (suit against State of Idaho).

[5] The venue concern implicated by the cases cited by UC is whether the state consented to be sued in federal court or state court, *not* whether consent to proceedings in one federal court could preclude transfer to another federal court as suggested by UC. *See, e.g., Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 307 (1990) (holding that the states of New York and New Jersey consented to be sued in *federal* court, rather than *state* court, and thereby waived their Eleventh Amendment immunity); *Pennhurst State Sch. and Hosp. v. Halderman*, 465 U.S. 89, 99 n.9 (1984) ("[T]he Court consistently has held that a State's waiver of sovereign immunity in its own [state] courts is not a waiver of the Eleventh Amendment immunity in the federal courts."); *Atascadero State*

As previously, mentioned, such principles of *waiver* are simply not applicable as the 11th Amendment immunity does not apply where the state is a willing plaintiff.

Accordingly, UC is *not* entitled to choose the forum in which it will proceed to trial, but is *only* entitled to choose to stay out of the federal court system entirely. Once a state decides to enter the federal court system by suing another party, it is loses its 11th Amendment protection and becomes like any other litigant subject to 28 U.S.C. §§ 1404 and 1407. *In re the Regents of the Univ. of Cal.*, 964 F.2d at 1134-35 ("Upon entering the litigation arena the Regents, like all litigants, become subject to the Federal Rules."). Any other rule would transform the state into a "super" litigant, enabling it to turn on and off its sovereign immunity depending on how the case was proceeding.

To summarize, if the state is a plaintiff, then the 11th Amendment immunity is not applicable and the state has no more control over the forum of the litigation than a private plaintiff. If the state is a defendant, then the 11th Amendment immunity is applicable and the suit may be dismissed unless the state has waived its immunity or Congress has abrogated the immunity. In either case, principles of sovereign immunity do not impact the decision regarding whether a § 1407 transferee court can transfer a case to the multidistrict venue for trial. Indeed, under UC's theory, a state would be immune to a transfer motion brought before the court where the case was

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Hosp. v. Scanlon, 473 U.S. 234, 241 (1985) ("[I]n order for a State statute . . . to constitute a waiver of Eleventh Amendment immunity, it must specify the State's intention to subject itself to suit in *federal court*.").

originally filed.[6] However, even under petitioner's theory of the case, the court where the litigation was originally filed would still have the power to transfer such a case under § 1404. (Pet. Br. at 23 n.7.) Thus, UC's theory regarding a state's right to control the forum of the litigation is not only contrary to the 11th Amendment jurisprudence of this Court, but is also outside the issues raised by the instant case and should not affect this Court's decision in any way.

II. 28 U.S.C. § 1407 DOES NOT PRECLUDE A § 1407 TRANSFEREE COURT FROM TRANSFERRING A CASE TO THE MULTIDISTRICT VENUE PURSUANT TO 28 U.S.C. § 1404

Petitioner and UC argue that the plain language of § 1407 precludes a district court presiding over a multidistrict litigation from transferring a case under § 1404 to the multidistrict venue for trial. In making this argument, they rely on the language from § 1407(a) that "[e]ach action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated." 28 U.S.C. § 1407(a). However, this language is not dispositive of the issue as it does not preclude, or even address, the issue of transfers under § 1404. The language "each action so transferred" refers to the preceding sentence of § 1407, which states that "transfers shall be made by the *judicial panel on multidistrict litigation*." *Id.* (emphasis added). Thus, the language cited and relied on by the petitioner pertains to the powers of the panel, and does *not* limit or in any

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[6] In fact, this was the very position argued by UC and rejected by the Federal Circuit in the recently concluded litigation regarding Lilly's human insulin product. 1997 U.S. App. LEXIS at *8-11.

way restrict the powers of a § 1407 transferee judge. As correctly stated by the Ninth Circuit, the "shall be remanded" clause of § 1407(a) was concerned with "creating and defining the functions of the J.P.M.L., not on redefining or circumscribing the traditional powers of the district court to which a case has been transferred." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 102 F.3d 1524, 1533 (9th Cir. 1996), *cert. granted*, 117 S. Ct. 1818 (1997).

Furthermore, in contrast to § 1407(a), § 1407(b) which pertains to the powers of the transferee judge specifically allows the judge to conduct "pretrial proceedings." Accordingly, as a motion to transfer the venue of trial is presumptively a pretrial motion,[7] the "plain" language of § 1407 allows "self-transfers" of the sort complained of by Petitioner and UC.

Even assuming that the plain language is in fact ambiguous, the applicable legislative history for § 1407 reveals that Congress clearly intended that § 1404 transfers would be available for cases consolidated for multidistrict proceedings. *Blum v. Stevenson*, 465 U.S. 886, 896 (1984)("[W]e look first to the statutory language and then to the legislative history if the statutory language is unclear."); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). The House Report accompanying § 1407 recognizes that, *inter alia*, because trial in the original district is generally preferable for the parties and witnesses and because it may be

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[7] 15 C. Wright, A. Miller & F. Cooper, *Federal Practice and Procedure*, § 3866, at 620 (2d ed. 1986) ("Furthermore, since a motion to transfer under Section 1404(a) is a pretrial motion, which typically is determined prior to the completion of discovery, it falls naturally within the transferee judge's statutory power to control all pretrial proceedings.")

impracticable to have all the multidistrict cases tried in one court, it is "desirable" that each consolidated case be remanded to the originating district at the close of coordinated pretrial discovery. H.R. Rep. No. 90-1130 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1898, 1901-02. If experience with multidistrict proceedings demonstrates that the actual trial should be held in the multidistrict venue, the House Report also states that only minor amendments could be made to the statute to effectuate this change. *Id.* This language indicates that Congress intended that the *default* situation, *i.e.* the result if no other action were taken, would be one in which each case would be returned to the original judicial district for trial.

The legislative history, however, also explicitly acknowledges that there are times where it would be beneficial to have a case *tried* in the multidistrict forum and specifically recognizes § 1404 as the appropriate vehicle for achieving that end. After discussing the above reasons why trial in the original forum may be preferable, the House report specifically states "[o]f course, 28 U.S.C. 1404, providing for changes of venue generally, is available in those instances where transfer of a case for all purposes is desirable." *Id.* at 1901-02. In this regard, it is important to note that the House Report also states that § 1407 "would not affect the place of trial in any case or exclude the possibility of transfer under other Federal statutes." *Id.* at 1900. Thus, Congress clearly intended that § 1404 transfers would be available for cases consolidated by the J.P.M.L. for pretrial proceedings.

In an attempt to explain this language away, *amicus* UC argues that such language was inserted as an *alternative* to pretrial consolidation under § 1407. (UC *Amicus* Br. at 13.) However, when read in the context of the preceding five sentences of the report, it is clear that although Congress intended that the J.P.M.L. would generally remand the

consolidated cases to the transferor court for trial, Congress understood that the § 1407 transferee court would have the ability to transfer the case to the multidistrict venue if the criteria of § 1404 were satisfied. 1968 U.S.C.C.A.N. at 1901-02. Indeed, in the very litigation that prompted promulgation of § 1407, many of the consolidated cases were tried *not* in the original district but in another judicial district pursuant to § 1404(a). During Congressional hearings on the proposed law, the Executive Secretary to the Coordinating Committee and Multiple Litigation of the Judicial Conference testified regarding the antitrust litigation against the electrical manufacturers industry upon which § 1407 was based. This testimony indicated that § 1404(a) transfers were used "quite widely" to transfer the trial venue of the cases that were part of the coordinated litigation. Hearing on H.R. 8276 Before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, 89th Cong. 22 (1966). Furthermore, the Executive Secretary specifically stated with regard to the proposed features of the bill that, "transfer shall take place under the provisions of this bill for the pretrial phase of the litigation, leaving the place of trial where the action began *or in some other district to which the action might conceivably be transferred under the existing provisions of section 1404(a).*" *Id.* at 23 (emphasis added).

Petitioner offers yet a different explanation of the House Report, asserting that the disputed language was intended to authorize the original transferor court, rather than the § 1407 transferee court, to transfer the case to another venue for trial under § 1404. (Pet. Br. at 23 n.7.) However, Petitioner's interpretation leads to the illogical conclusion that a court unfamiliar with the case, the issues, and the parties, should adjudicate the merits of a transfer motion. Such an interpretation directly contradicts the very policies of promoting judicial economy underlying both §§ 1404 and 1407.

Moreover, most cases which are transferred pursuant to § 1404 are done so *before* discovery is complete.[8] Indeed, the fact that discovery on the merits has proceeded and that there has been a delay in seeking a transfer weighs against transferring venue under § 1404(a).[9] Accordingly, such transfers are squarely within the mandate of the § 1407 transferee court's power to conduct *pretrial* proceedings. Therefore, as Congress has clearly expressed its intent that § 1404 transfers are available for cases consolidated for pretrial proceedings under § 1407, "that is the end of the matter." *Chevron*, 467 U.S. at 842-43.

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[8] 17 James W. Moore et al., *Moore's Federal Practice*, § 111.17 (3d ed. 1997). 15 C. Wright, A. Miller & F. Cooper, *Federal Practice and Procedure*, § 3844 (2d ed. 1986).

[9] *Pathe Computer Control Sys. Corp. v. Kinmont Indus., Inc.*, 955 F.2d 94, 96 (1st Cir. 1992) (Breyer J.) (holding that filing of transfer motion after completion of discovery was merely to delay trial); *Peteet v. Dow Chem. Co.*, 868 F.2d 1428, 1436 (5th Cir. 1989) (holding that eighteen month delay weighs against transfer); *Moore v. Telfon Communications Corp.*, 589 F.2d 959, 968 (9th Cir. 1978) (fact that litigation continued for six years before transfer motion weighed against transferring venue); *McDonnell Douglas Corp. v. Polin*, 429 F.2d 30 (3d Cir. 1970) (reversing district court's decision to postpone decision on transfer motion until after completion of fact discovery); *Pilkington v. United Airlines, Inc.*, 855 F.Supp. 1248, 1250 (M.D. Fla. 1994) (holding that defendants' delay of two years and fact that case was well into discovery weighed against ordering transfer). *Sylvestre v. Oswald*, No. 91 Civ. 5060, 1993 U.S. Dist. LEXIS 14607, at *4 (S.D.N.Y. Oct. 15, 1993) (holding that "delay in raising the issue of transfer favors plaintiffs in the balance of equities."); *Meinerz v. Harding Bros. Oil & Gas Co.*, 343 F.Supp. 681, 682 (E.D. Wis. 1972) (holding that nine month delay weighed against transfer).

However, even assuming that the legislative history does not answer the question at hand, the J.P.M.L. has enacted a specific rule that allows precisely the transfers complained of by both petitioner and UC. Realizing that most complex statutory frameworks leave "gaps" regarding the administration of the statute, Congress specifically authorized the J.P.M.L. to prescribe rules consistent with the acts of Congress and the Federal Rules of Civil Procedure. 28 U.S.C. § 1407(f). Pursuant to this power, the J.P.M.L. enacted rule 14(b), which states:

> Each transferred action that has not been terminated in the transferee district court shall be remanded . . . unless ordered transferred by the *transferee* judge to the transferee or other district under 28 U.S.C. § 1404(a) or 28 U.S.C. § 1406.

J.P.M.L. 14(b) (emphasis added). As Rule 14(b) clearly interprets § 1407 as allowing the "self-transfer" objected to by petitioner and UC, and in the absence of specific guidance from Congress, this Court should examine whether the panel's rule is "based on a permissible construction of the statute." *See Chevron*, 467 U.S. at 843-44 ("Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."); *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991)("When Congress, through express delegation or the introduction of an interpretive gap in the statutory structure, has delegated policymaking authority to an administrative agency, the extent of judicial review of the agency's policy determinations is limited.")[10]

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[10] Judge Kozinski's dissent argues that the rules of J.P.M.L. should not be provided *Chevron*-like deference because "they do [not] have the dignity of executive branch regulations promulgated pursuant to a substantive grant of rule-making authority." *Lexecon*, 102 F.3d at 1549. Yet, Congress itself has indicated that J.P.M.L. should receive such deference by explicitly granting the panel authority to promulgate the necessary rules to carry out its statutory mandate and specifically stating that the "panel may prescribe rules for the conduct of its business *not inconsistent with* Act of Congress and the Federal Rules of Civil Procedure." 28 U.S.C. § 1407(f) (emphasis added). Indeed, such deference is eminently reasonable as the members of the J.P.M.L. consist of no less than seven federal circuit judges and district judges designated by the Chief Justice of this Court. 28 U.S.C. § 1407(d). As stated by the Ninth Circuit, "[r]espect for our brethren, and their longstanding practice, requires us to presume, absent compelling evidence to the contrary, that the rules promulgated pursuant to section 1407(f) are 'not inconsistent with Acts of Congress.'" 102 F.3d at 1533 n. 7. Furthermore, and contrary to Judge Kozinski's view, Congress afforded *greater* deference to the rules of the J.P.M.L. than to local court rules by specifically using the language "not inconsistent with Acts of Congress" in § 1407(f) rather than the less deferential language of "shall be consistent with Acts of Congress" of § 2071(a). *Compare* 28 U.S.C. § 1407(f) *with* 28 U.S.C. § 2071(a). Accordingly, as the J.P.M.L. is specifically empowered to formulate the necessary rules to effectuate Congress' intent in administering § 1407, the fact that the panel is a *judicial* body does not necessarily mean that it is not entitled to *Chevron*-like deference. *See Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979) (holding that regulations of the Council on Environmental Quality are to be afforded substantial weight); *McMillan Park Comm. v. National Capital Planning Comm'n*, 968 F.2d 1283, 1287-88 (D.C. Cir. 1992) (following *Andrus* and providing *Chevron*-like deference to interpretation of Advisory Council on Historic Preservation).

It is at least a *permissible* construction of the statute for the transferee court to decide a motion to transfer the venue of the trial under § 1404 based on the above discussed legislative history. Indeed, such a construction is particularly compelling

based on the very policies underlying a transfer under § 1404(a). In order to transfer a case under 28 U.S.C. § 1404(a), two criteria must be satisfied: (1) the transfer must be "[f]or the convenience of parties and witnesses, [and] in the interest of justice[;]" and (2) the plaintiff must have been able to bring the action in the new forum. The purpose of this statute is to "protect litigants, witnesses and the public against unnecessary inconvenience and expense." *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19, 27 (1960). Indeed, these are the same considerations discussed in the House Report for requiring remand to the transferor district as the default situation. Thus, if these factors favor trying the case in another district, it is completely consistent with the policies underlying both § 1407 and § 1404 to do so.

In litigation involving complex subject matter, such as multidistrict litigation, the interests of justice, including principles of judicial economy, "may be determinative to a particular transfer motion." *UC v. Lilly*, 1997 U.S. App. LEXIS at *13 (citing *Coffey v. Van Dorn Iron Works*, 796 F.2d 217, 220 (7th Cir. 1986)). In such situations, it is completely logical and consistent with Congress' goal of promoting judicial economy to have the court already familiar with the parties, the likely witnesses, the facts, and the applicable legal issues adjudicate the merits of a motion to transfer.[11] Furthermore, in

[11] In response, UC advocates that the dictionary definition of the word "transfer" precludes a § 1404 transfer to the multidistrict venue because the term "transfer" is defined by a "move to a different place, region or situation." (UC *Amicus* Br. at 12-13). UC, however, ignores the fact, as previously mentioned, that the *trial* venue remains with the transferor court unless and until it is transferred by the § 1407 transferee judge. Thus, the venue of the *trial* is indeed "moving to a different place," from the transferor venue to the multidistrict transferee venue.

many cases the multidistrict forum will *not* be an appropriate forum under § 1404 because the plaintiff could not have initiated the litigation in the § 1407 transferee district due to considerations of venue and personal jurisdiction. *Hoffman v. Blaski*, 363 U.S. 335, 343-44 (1960) (holding that a case can only be transferred to a district where the plaintiff could have sued the defendant). Accordingly, as both the plain language of 28 U.S.C. § 1407, the House Report accompanying § 1407, and the rules of the J.P.M.L. all provide that a § 1407 transferee court can transfer the place of trial from the transferor court to the § 1407 transferee venue pursuant to § 1404(a), this Court should affirm the well-reasoned opinion of the Ninth Circuit.

III. EVEN IF THIS COURT DETERMINES THAT A § 1407 TRANSFEREE COURT CANNOT TRANSFER THE CASE UNDER § 1404, THIS DECISION SHOULD ONLY BE GIVEN PROSPECTIVE EFFECT

Not all decisions by this Court are applied retroactively to the parties currently before the Court. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-107 (1971); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 534-36 (1991). In *Chevron Oil*, this Court set forth a three-part test to determine whether a decision will apply retroactively or only prospectively: (1) the decision must establish a new principle of law by either overruling clear precedent upon which the parties relied or "by deciding an issue of first impression whose resolution was not clearly foreshadowed;" (2) prospective application of the new rule must not retard the rule's operation based on the rule's history, purpose, and effect; and (3) retroactive application of the new rule would produce a substantial inequitable result. *Chevron Oil*, 404 U.S. at 106-07; *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 122 (1993)(O'Connor, J., dissenting).

In applying the *Chevron Oil* three-part test, this Court has either made its decisions fully retroactive (applied to the parties before the Court and all cases currently pending in the system), selectively prospective (applied to the parties before the court but not to the other cases still pending), or purely prospective (applied only to cases filed after the decision). *James B. Beam,* 501 U.S. at 535-36. However, since *Chevron Oil,* the Court has eliminated the doctrine of selective prospectivity, holding that if the Court applies a decision to the parties before the Court it must apply the decision to all pending cases. *Id.* at 543; *Harper,* 509 U.S. at 97. The doctrine of pure prospectivity, however, continues to be viable.[12]

Accordingly, even if this Court determines that a transfer under § 1404(a) is inconsistent with § 1407, the Court should apply its decision only prospectively to cases filed after the date of this decision as demonstrated by a proper evaluation of each of the three *Chevron* factors.

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[12] *Ryder v. United States*, 115 S. Ct. 2031, 2033 (1995) (questioning validity of *Chevron* but then specifically holding that the case did not involve "the sort of grave disruption or inequity involved in awarding retrospective relief to this petitioner that would bring the Chevron Oil doctrine into play."); *Harper*, 509 U.S. 86, 116 (1993)(O'Connor, J., dissenting)(stating that the majority opinion in *Harper* did not overrule pure prospectivity); *McKinney v. Pate*, 20 F.3d 1550, 1565-66 (11th Cir. 1994) (holding that retroactive effect is a general presumption that may still be rebutted by the *Chevron* analysis), *cert. denied,* 513 U.S. 1110 (1995); *Luckett v. Jett*, 966 F.2d 209, 213 (7th Cir. 1992) (holding that the *Chevron* analysis survived this Court's decision in *Beam* and applying new rule only prospectively); *Westinghouse Elec. Corp. v. Franklin*, 993 F.2d 349, 354 (3d Cir. 1993) (applying *Chevron* analysis after *Beam*).

As admitted by Petitioner, a reversal of the Ninth Circuit's opinion would be directly contrary to the J.P.M.L.'s own rules and clear precedent followed by every court that has considered the issue of so-called "self transfers" over the last thirty years. (Pet. Br. at 25). Moreover, respondent and all other similarly situated litigants participating in multidistrict litigation (including Lilly in the *UC v. Lilly* case) have undeniably relied on this consistent interpretation of the rule. Thus, the first *Chevron* criterion favors prospective application.

The second *Chevron* factor also favors only prospective application. As previously mentioned, Congress enacted § 1407 to promote judicial economy by consolidating cases for pretrial proceedings. It would be manifestly contrary to Congressional intent to require new trials for claims that have already been adjudicated in a forum where jurisdiction and venue would have been proper and where the plaintiff could have originally filed the action. *See Caterpillar, Inc. v. Lewis,* 117 S. Ct. 467, 470 (1996)(holding that "considerations of finality, efficiency, and economy" outweigh a district court's error in not remanding case to state court where district court has jurisdiction at time of judgment).[13] To void such trials

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[13] UC seeks to distinguish *Caterpillar* by arguing that the jurisdictional defect was there cured, but the jurisdictional defect in the instant case was not cured. (UC *amicus* Br. at 8 n.3.) Yet, in *Caterpillar*, this Court specifically stated "a statutory flaw -- Caterpillar's failure to meet the § 1441(a) requirement that the case be fit for federal adjudication at the time the removal petition is filed -- *remained in the unerasable history of the case*." 117 S. Ct. at 475. Despite this clear statutory flaw, the Court did not vacate the district court's decision because the district court possessed subject matter jurisdiction at the time of trial. *Id.* at 476-77. The Arizona district court, in the instant case, undeniably had jurisdiction over the parties and was a place where the litigation could have been filed. Thus,

simply because the *wrong* court decided the transfer question frustrates the very purpose of Congress in this regard and, therefore, favors prospective application of the decision. Moreover, retroactive application of the Court's decision is not "necessary to insure future compliance" with the rule. *Luckett*, 966 F.2d at 214.

Finally, the third *Chevron* factor overwhelmingly favors prospective application because applying the decision retroactively would impose severe inequity and hardship on the parties and other affected litigants. In the instant case, Respondent was victorious at trial and the decision was affirmed by the Ninth Circuit. In this Court, Petitioners do not even allege that the trial court or the Ninth Circuit committed any substantive errors, but only assert that the wrong court decided the pretrial transfer motion. As mentioned above, to void a full trial and appeal in such circumstances would impose severe prejudice on the Respondent.

While Lilly is not in a position to quantify the prejudice to Respondent, Lilly can quantify the hypothetical prejudice to itself if the trial in the *UC v. Lilly* action were to be voided based on a perceived defect with respect to which federal judge decided the transfer motion.[14] Lilly spent thousands of hours

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under *Caterpillar*, this Court need not vacate the judgment of the district of Arizona. Indeed, the statutory "flaw " in *Caterpillar* was of a more serious nature than the alleged "flaw " raised by the instant case as *Caterpillar* involved principles of federalism and the proper respect for state courts, while the instant case only concerns a pretrial transfer motion.

[14] The Court's opinion would not actually affect the *UC v. Lilly* case in this regard because *UC* waived the specific issue raised by this case. 1997 U.S. App. LEXIS at *14-15.

and millions of dollars preparing for a bench trial in Indiana. The trial lasted two weeks and was attended by witnesses from Germany, England, Boston, Washington, D.C., Dallas, Chicago, Los Angeles, and San Francisco. The trial judge reviewed a trial record of approximately 10,000 pages and issued a 97 page typed opinion. Hundreds of thousands of dollars were expended briefing and arguing the case before the U.S. Court of Appeals for the Federal Circuit, which deliberated for seven months before delivering a 33 page opinion. If Lilly were required to conduct the jury trial in San Francisco to which UC claims to be entitled, the amount of money and effort that would have to be respent is staggering. That waste would be multiplied dozens if not hundreds of time if applied to all the cases currently in the federal system.[15]

The *UC v. Lilly* litigation tellingly demonstrates how applying the decision retroactively could hypothetically lead to severe inequity merely because the wrong judge decided the transfer motion, particularly where litigants relied on thirty years of uniform interpretation of § 1407. Such inequity is totally unwarranted, particularly where it is not clear whether the original transferor court would have decided a transfer motion any differently than the § 1407 transferee court. Accordingly, for all the above reasons, Lilly submits that if the Court reverses the Ninth Circuit, its decision should only be provided prospective effect.

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[15] Since 1968, the J.P.M.L. has centralized 109,410 civil actions; 3,757 action have been remanded for trial; 57,116 actions have been terminated by the transferee court; 279 actions have been reassigned within transferee districts; and 48,258 actions remain pending. Administrative Office of the United States Courts, *Judicial Business of the United States Courts*, 1996 Report of the Director at 29.

CONCLUSION

For the foregoing reasons, Lilly, as *amicus curiae*, urges the Court to affirm the decision of the Ninth Circuit in this case.

Respectfully submitted,

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